Supreme Court, U.S.
FILED

0 1 583 SEP 24 2001

OFFICE OF THE CLERK

No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DANIEL JAMES FOWLIE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, California 90405
(310) 399-3259

Counsel for Petitioner
DANIEL JAMES FOWLIE

* Counsel of Record

40 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in requiring petitioner prove his counsel's actual conflict had an adverse effect on his performance in order to establish a Sixth Amendment violation, where the trial judge failed to inquire into the conflict, and either knew or reasonably should have known of the conflict?

2. Did the Court of Appeals err in ruling that because petitioner's counsel vigorously challenged the government's evidence of guilt, his failure to offer evidence which assumed petitioner's innocence was not an adverse effect of his actual conflict?

PARTIES TO THE PROCEEDINGS

Petitioner Daniel James Fowlie was the petitioner in the district court and appellant in the Court of Appeals for the Ninth Circuit. Before the district court, the respondent was the United States of America. The Court of Appeals for the Ninth Circuit identified the appellee as being the United States of America, and it is the only respondent in this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

Table of Authorities vii

ORDERS OF THE DISTRICT AND CIRCUIT COURT 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED 1

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 4

A. Initial Proceedings In The District Court 4

B. Direct Appeal 8

C. Collateral Proceedings 8

SUMMARY OF REASONS FOR GRANTING THE WRIT 10

REASONS FOR GRANTING THE WRIT 11

I. The Court of Appeals Erred in Requiring Petitioner Demonstrate His Counsel's Actual Conflict Of Interest Had an Adverse Effect On His Performance in Order to Establish a Sixth Amendment Violation, Given that the Judge Failed to Inquire Into the Conflict Which She Knew or Reasonably Should Have Known Existed 11

A. The Sixth Amendment Right to Conflict-Free Counsel 11

B. A Trial Judge Has a Duty to Inquire into a Conflict about Which She Knows or Reasonably Should Know. 11

C. A Petitioner Is Entitled to Relief Without the Need to Demonstrate an Actual Conflict Adversely Affected His Lawyer's Performance, If A Judge Fails to Inquire into an Actual Conflict about Which She Knows or Reasonably Should Know 12

D. Petitioner's Counsel Was Burdened by an Actual Conflict ... 16

E. The Judge Knew or Reasonably Should Have Known of the Actual Conflict and Failed to Inquire Into the Conflict 18

II. The Court of Appeals Erred in Ruling That Counsel's Vigorous Challenge to the Government's Evidence of Guilt, Demonstrated His Failure to Offer Evidence to Prove Affirmatively Petitioner's Innocence Was Not an Adverse Effect of the Actual Conflict 19

A. An actual conflict adversely affects a lawyer's performance, where a lawyer is confronted with a strategic decision that will impact his self-interest and the interest of his client differently, and he chooses the course of action that favors his own interest 19

B. Counsel's failure to offer available evidence to prove affirmatively petitioner was not guilty constituted an adverse effect of the actual conflict 22

C. Petitioner's showing that counsel's failure to offer evidence of innocence was an adverse effect of his actual conflict is not rebutted by counsel's defense of petitioner through cross-examination and argument .. 27

CONCLUSION 29

INDEX TO APPENDIX

APPENDIX A

Order of United States Court of Appeals for the Ninth Circuit Denying Appellant Daniel James Fowlie's Petition For Rehearing. Filed June 26, 2001 ..... A-1

APPENDIX B

Memorandum of United States Court of Appeals for the Ninth Circuit Affirming District Court's Denial of Appellant Daniel James Fowlie's Habeas Petition De Novo. Filed March 9, 1999 ..... B-2

APPENDIX C

Order Denying Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody. Filed October 15, 1997 ..... C-6

TABLE OF AUTHORITIES

Page

Brian v. United States,
695 F.2d 10 (1st Cir. 1982) 15

Ciak v. United States,
59 F.3d 296 (2nd Cir. 1995) 15

Cuyler v. Sullivan,
446 U.S. 335 (1980) ..... passim

Glasser v. United States,
315 U.S. 60 (1942) 20, 21

Holloway v. Arkansas,
435 U.S. 475 (1978) ..... passim

Mickens v. Taylor,
240 F.3d 348 (4th Cir.),
cert. granted, 121 S. Ct. 1651 (2001) 10, 15, 16

Nix v. Whiteside,
475 U.S. 157 (1986) 16, 17

Strickland v. Washington,
466 U.S. 668 (1984) 22

United States v. Burney,
756 F.2d 787 (10th Cir. 1985) 15

United States v. Cirrincione,
780 F.2d 620 (7th Cir. 1985) 15

United States v. Crespo del Llano,
830 F.2d 1532 (9th Cir. 1987) 15

United States v. Fowlie,
24 F.3d 1070 (9th Cir. 1994),
cert. denied, 513 U.S. 1086 (1995) 8

United States v. Stites,
56 F.3d 1020 (9th Cir. 1995),
cert. denied, 516 U.S. 1138 (1996) 2, 16

STATUTES AND RULES

18 United States Code

§ 371 4

21 United States Code

§ 841 (a)(1) 4
§ 848 4
§ 848(c) 25

28 United States Code

§ 1291 1
§ 2253 1
§ 2255 ..... 1, 8

31 United States Code

§ 5316 ..... 5, 6
§ 5322(a), (b) 5, 6

ORDERS OF THE DISTRICT AND CIRCUIT COURT

The June 26, 2001 order of the Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing is unreported. A copy of the order is Appendix A. The March 9, 1999 Memorandum of the Court of Appeals affirming the district court's denial of petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate his conviction is unreported. A copy of the Memorandum is Appendix B. The district court's order denying petitioner's § 2255 motion is unreported. A copy of the order is Appendix C.

JURISDICTION

Petitioner invoked the jurisdiction of the district court by filing a motion pursuant to 28 U.S.C. § 2255. Petitioner appealed and invoked the jurisdiction of the court of appeals pursuant to 28 U.S.C. §§ 1291 & 2253.

The jurisdiction of this Court to review the order of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Amendment VI, U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

PRELIMINARY STATEMENT

Petitioner Daniel James Fowlie was represented at trial by a lawyer who had previously represented his son in a related case before the same judge who presided at petitioner's trial. Unbeknownst to petitioner, in representing petitioner's son, the lawyer told the judge petitioner was indisputably guilty, that it would be foolish to contend otherwise, and that petitioner was also responsible for his son's criminal activity.

The position advanced by the attorney in representing petitioner's son necessarily circumscribed his representation of petitioner. Having openly adopted the position that petitioner was guilty, the attorney "could not swallow [his] words and present [petitioner] as an innocent man." *United States v. Stites*, 56 F.3d 1020, 1025 (9th Cir. 1995) *cert. denied* 516 U.S. 1138 (1996). Moreover, the attorney was ethically restrained from offering evidence which assumed petitioner's innocence because, based on his earlier public statements to the trial judge, the attorney would know, or have reason to believe, that such evidence was false. By aiding in its presentation, the attorney would violate "defense counsel's obligation to avoid assisting in the presentation of what counsel ha[s] reason to believe [is] false testimony." *Holloway v. Arkansas*, 435 U.S. 475, 480, n.4 (1978)

The attorney's defense of petitioner at trial was limited to challenging the government's evidence and arguing it failed to prove petitioner's guilt. The attorney refrained from offering available evidence to prove

affirmatively petitioner was not guilty, including evidence that provided an innocent explanation for otherwise incriminating conduct. Petitioner was convicted and sentenced to thirty years. His conviction and sentences were affirmed on appeal.

After learning post-appeal of the above facts regarding his lawyer's representation of his son, petitioner filed a motion to vacate his conviction, on grounds that he had been denied his Sixth Amendment right to conflict-free counsel. The district court ruled petitioner had failed to establish an actual conflict and alternatively failed to demonstrate an adverse effect, and denied relief without an evidentiary hearing.

On appeal, the Ninth Circuit acknowledged the lawyer's self-interest created an actual conflict, and that petitioner had not been advised of or waived the conflict. The court, however, ruled petitioner was not entitled to relief because the lawyer's vigorous defense of petitioner demonstrated the actual conflict did not adversely affect counsel's performance.

This ruling conflicts with this Court's precedent and the principles it has established to govern conflict claims. Under this Court's precedent, petitioner was entitled to relief without the need to demonstrate the actual conflict had an adverse effect, because the trial judge failed to inquire into the conflict, about which she knew or reasonably should have known.

The court of appeals also erred in ruling that counsel's vigorous defense of petitioner through cross-examination and argument demonstrated his actual conflict did not adversely affect his performance. This Court has recognized that the adverse effect of a conflict often is what counsel refrains from doing. The adverse effect of the conflict was that counsel refrained from defense efforts that conflicted with his self-interest, i.e., offering available evidence which required him to assume petitioner's innocence. That showing of adverse effect cannot be rebutted by counsel's defense efforts at cross-examination and argument, because those efforts were consistent with his self-interest.

STATEMENT OF THE CASE

A. Initial Proceedings In The District Court

On November 30, 1988, a Central District of California grand jury returned a superseding indictment charging petitioner Daniel James Fowlie with marijuana related offenses, including engaging in a continuing criminal enterprise ("CCE") (21 U.S.C. § 848).[1]

---

[1] The indictment also charged petitioner with conspiracy to possess marijuana with intent to distribute (21 U.S.C. § 846); seventeen counts of possession and distribution of marijuana (21 U.S.C. § 841(a)(1)); conspiracy to defraud the United States by impeding the IRS (18 U.S.C. § 371); and five counts of failing to report currency transportation

In June, 1989, the grand jury returned a related twenty-five count indictment charging petitioner's two sons, Gus Fowlie and Dan Fowlie, Jr., and other defendants, with conspiracy to possess with intent to distribute marijuana and related charges. Petitioner was named as an unindicted coconspirator. According to the government, "although father and son were charged in separate indictments, the acts underlying the conspiracies alleged in the two cases are substantially identical." App C -16-18.

Attorney James D. Riddet represented petitioner's son Gus Fowlie. Riddet negotiated an agreement for Gus Fowlie to plead guilty to one count of conspiracy to possess marijuana with intent to distribute. App C -17. As a condition of the plea Gus Fowlie made a written statement incriminating petitioner, stating he had "assist[ed] in the transportation, storage, packing and distribution of marijuana at the direction of Daniel James Fowlie and others." App C -17.

At sentencing, Riddet minimized Gus Fowlie's offense by assigning responsibility for his involvement in the marijuana conspiracy to petitioner. Riddet told the judge, "It would be foolish to dispute the fact that Mr. Fowlie senior [petitioner] was running an extremely large marijuana organization. And what concerns me is *(sic)* counsel for Gus Fowlie is that that might rub over onto Gus Fowlie who was indeed a minimal participant, nothing

---

(31 U.S.C. §§ 5316, 5322(a),(b)).

more than unfortunately the son of Dan Fowlie senior." App Ç -17. Riddet made further statements to the judge that assumed and asserted petitioner's guilt. *Id.*

The judge expressed her agreement, stating petitioner had "snar[ed] both" Gus Fowlie and his brother into the marijuana operation and sentencing Gus Fowlie to 24 months imprisonment. App C -17-18.

In June, 1990, nine months after Gus Fowlie's sentencing on September 25, 1989, petitioner appeared before the court, having been extradited from Mexico. Initially petitioner was represented by appointed counsel and subsequently retained private counsel, San Diego attorney Michael Pancer, and Pancer selected Riddet as local counsel. App C 18-19.

Riddet sought to file a substitution of attorney authorizing he and Pancer to replace petitioner's appointed counsel. The judge refused the substitution, stating "[i]t seems to me I should rightly be concerned also about the possibility of a conflict here," explaining that "I can only say that I'm left with the impression that the Fowlie juniors had strongly suggested, if not through counsel, through some of the filings with the court, that it was Dan Fowlie who is responsible for everyone's misconduct in this case." Reporter's Transcript ("RT") 11/19/90 p. 142-43.

On November 21, 1990, petitioner's appointed attorneys filed a motion requesting Pancer and Riddet be allowed to replace them. App C -18-19. App C-19. The

government's opposition said Riddet had a conflict, and expressed "serious reservations as to whether it is possible for [petitioner] to fully and effectively waive the conflicts." App C-19.

On November 26, 1990, the judge denied the proposed substitution of Pancer because he had represented a prospective government witness. App C-19. The judge also stated she was "not satisfied that there is not a problem here [with attorney Riddet]," and declined to permit his substitution. RT 11/26/90, p. 39.

On December 4, 1990, Riddet filed a motion with petitioner's appointed counsel to continue the trial date and to allow him to substitute into the case. App C-20. At a hearing on December 10, the judge again expressed reservations about Riddet's representation of petitioner, stating she would allow Riddet to argue the pretrial motions set for hearing that day "[s]olely under these circumstances perhaps as lacking any other status amicus at this time." RT 12/10/90, p. 10. Near the conclusion of the hearing, after it became apparent the trial would be continued, the judge granted the motion to substitute, even though it had not been argued or even discussed. App C-19.

The court issued a minute order stating that no conflict of interest existed in Riddet's representation of petitioner. App C-19-20 ("Court hears further from all counsel re defendant's motion to continue and substitute counsel, finds no conflict exists re Attorney Riddet . . . .").

Trial began on March 5, 1991. Twenty counts of the indictment went to the jury, and guilty verdicts returned as to fifteen, including the CCE charge. Petitioner was sentenced in June, 1991 to 30 years on the CCE count and concurrent sentences on the remaining counts totaling 25 years, and a $1 million fine.

B. Direct Appeal

Petitioner's conspiracy conviction was vacated on direct appeal, and all other convictions were affirmed in two separate opinions. *United States v. Fowlie*, 24 F.3d 1059 and 24 F.3d 1070 (9th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995).

C. Collateral Proceedings

On October 2, 1995, petitioner filed a motion pursuant to 28 U.S.C. section 2255 to vacate his conviction and sentence. CR 312, 313. The motion contained a double jeopardy claim and a conflict of interest claim.[2] The conflict claim was supported by declarations from petitioner and two experts, Professor Geoffrey Hazard and

---

[2] The motion also alleged attorney Riddet had an actual conflict based on his representation of Gus Fowlie, and a third actual conflict based on his representation of Wade Westmoreland, the manager of petitioner's ranch, in a related state prosecution and in proceedings before the grand jury that indicted petitioner. Review is sought only as to the self-interest conflict.

Professor Dennis Curtis. CR 314.

The government filed its opposition on July 8, 1996. No declaration or statement from Riddet disputing petitioner's allegations was submitted in support of the opposition. CR 332.

The district court filed denied the motion in a written order. App C. The district court said that petitioner's arguments that his lawyer had an actual conflict were "pure speculation," and ruled alternatively that petitioner had failed to demonstrate an adverse effect of the claimed actual conflict. App C-10-11. Petitioner timely appealed on October 30, 1997. CR 347.

On appeal, the Ninth Circuit acknowledged the lawyer's self-interest created an actual conflict, and that the record did not reflect petitioner had been advised of the conflict. App B-4-5. The court, however, said petitioner was required to further demonstrate that the conflict adversely affected counsel's performance, and ruled that defense counsel's vigorous defense of petitioner throughout cross-examination and argument demonstrated the actual conflict did not adversely affect his performance. App B-5.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Review should be granted because the ruling of the Court of Appeals for the Ninth Circuit presents the same question as to which the Court has granted *certiorari* in *Mickens v. Taylor*, 240 F.3d 348, 358-59 (4th Cir.)(en banc), *certiorari granted*, 121 S. Ct. 1651 (2001) - "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?".

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Erred in Requiring Petitioner Demonstrate His Counsel's Actual Conflict Of Interest Had an Adverse Effect On His Performance in Order to Establish a Sixth Amendment Violation, Given that the Judge Failed to Inquire Into the Conflict Which She Knew or Reasonably Should Have Known Existed

A. The Sixth Amendment Right to Conflict-Free Counsel

The right to counsel guaranteed by the Sixth Amendment encompasses the right to be represented by counsel whose duty of loyalty is free of conflicting interests. *Wood v. Georgia*, 450 U.S. 261, 271 (1981), *citing*, *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 483, n.5 (1978) (constitutional right to "the assistance of an attorney unhindered by a conflict of interests.")

B. A Trial Judge Has a Duty to Inquire into a Conflict about Which She Knows or Reasonably Should Know.

This Court has established limited circumstances in which a trial court has a duty to inquire about a potential conflict. Where a defendant or counsel raises an objection to representation on conflict of interest grounds, a court

has a duty of inquiry. *Holloway*, 435 U.S. at 483-484 (defendants' convictions reversed due to the trial court's failure, after repeated objections by defense counsel, to inquire into the risk of joint representation or appoint separate counsel). Even in the absence of an objection, a trial judge has an affirmative duty to inquire into a conflict if the judge "knows or reasonably should know that a particular conflict exists." *Sullivan*, 446 U.S. at 347; *Wood*, 450 U.S. at 273, n.18.

C. A Petitioner Is Entitled to Relief Without the Need to Demonstrate an Actual Conflict Adversely Affected His Lawyer's Performance, If a Judge Fails to Inquire into a Conflict about Which She Knows or Reasonably Should Know.

As a general rule, to establish a denial of the right to conflict-free counsel, a petitioner who did not object at trial must "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348.

A different rule applies where a trial court fails to fulfill its duty of inquiry. Where a trial court knows or reasonably should know that a conflict exists, and fails to inquire into the conflict, a petitioner need only demonstrate that an actual conflict existed to be entitled to relief. A petitioner is not required to additionally establish the conflict "adversely affected" the lawyer's performance. *Wood*, 450 U.S. at 273, n.18 ("Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry

even though it 'knows or reasonably should know that a particular conflict exists.'"), *quoting*, *Sullivan*, 446 U.S. at 347 (emphasis in original).

The rule established by *Sullivan*, and recognized by the Court in *Wood*, which dispenses with the need for a petitioner to demonstrate "adverse effect," finds its origin in the Court's earlier decision in *Holloway, supra.* Defense counsel in *Holloway* repeatedly objected to being required to represent three codefendants at the same trial. The trial court did not take any action in response to the objections, other than to deny them. *Id.*, 435 U.S. at 478-481.

The Court ordered the defendants' convictions reversed. *Id.*, 435 U.S. at 484. The Court did not examine whether the lawyer's performance was adversely affected by an actual conflict, nor did it even determine whether an actual conflict existed. Instead, the Court ruled relief was warranted due to the trial court's failure to inquire into the risks that multiple representation presented, or to appoint separate counsel. *Ibid.* Thus, *Holloway* established that where a trial court is made aware of a possible conflict of interest by a defense objection, and fails to inquire into the conflict, a defendant is entitled to relief based on the court's failure to fulfill its duty to inquire.

The Court expanded the scope of the duty of inquiry rule established by *Holloway* in *Sullivan.* According to *Sullivan*, a trial court has a duty to inquire if it "knows or reasonably should know that a particular conflict exists." *Sullivan*, 446 U.S. at 347.

The *Holloway-Sullivan* duty of inquiry rule was applied by the Court in *Wood v. Georgia*, *supra.* The petitioners in *Wood* challenged the revocation of their probation on equal protection grounds, alleging that the revocation of their probation for failure to pay a fine discriminated against them on the basis of wealth in violation of the Equal Protection Clause of the Fourteenth Amendment. *Wood*, 450 U.S. at 262. The Court granted review to address that question, but then declined to do so because it realized the record suggested "that petitioners may be in their present predicament because of the divided loyalties of their counsel . . ." *Id.*, 450 U.S. at 262-263. The Court observed that the same lawyer had represented all three petitioners throughout the proceedings, and that the lawyer's fee in all three instances was paid by petitioners' employer, the owner of the adult book store where petitioners committed the crimes. *Id.*, 450 U.S. at 265-267.

The Court determined that the existence of a conflict was sufficiently apparent from the record so as to impose upon the state court a duty of inquiry under *Sullivan*. After determining the trial court had a duty of inquiry, and that it had failed to fulfill that duty, the Court ordered a remand "to determine whether the conflict of interest that this record strongly suggests actually existed," and directed a new hearing be granted if "an actual conflict of interest existed at that time." *Wood*, 450 U.S. at 274. The Court did not condition the right to relief upon a showing that counsel's performance was adversely affected by an actual conflict, but only upon a showing that an actual conflict existed.

Further support for the conclusion that where a court has failed to fulfill its duty of inquiry under *Sullivan*, a defendant need only establish that an actual conflict existed to be entitled to relief, is provided by the Court's statement in footnote 18: "Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Wood*, 450 U.S. at 273, n.18, *quoting*, *Sullivan*, 446 U.S. at 347 (emphasis in original).

The right to relief established by *Sullivan* where a court fails to fulfill its duty of inquiry, and an actual conflict is demonstrated to exist, has been applied or acknowledged by four circuits. See *Ciak v. United States*, 59 F.3d 296, 302 (2d Cir. 1995); *United States v. Crespo de Llano*, 830 F.2d 1532, 1538 (9th Cir. 1987); *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir. 1985); *United States v. Burney*, 756 F.2d 787, 791 (10th Cir. 1985).

The First and Fourth Circuits, on the other hand, disagree that *Sullivan* or *Wood* establish such a rule. According to those circuits, even where a court has failed to fulfill its duty of inquiry, a defendant must demonstrate not only that an actual conflict existed, but that the actual conflict adversely affected counsel's performance. See *Mickens v. Taylor*, 240 F.3d 348, 358-59 (4th Cir. 2001)(en banc), *certiorari granted*, 121 S. Ct. 1651 (2001); *Brian v. United States*, 695 F.2d 10, 15, n.10 (1st Cir. 1982).

The question of whether a petitioner must establish an actual conflict of interest existed, and demonstrate that it adversely affected his lawyer's performance in order to

obtain relief where a trial court fails to fulfill its duty of inquiry, is presently before this Court pursuant to the grant of *certiorari* in the Fourth Circuit's decision in *Mickens v. Taylor*, 121 S. Ct. 1651 (2001).

D. Petitioner's Counsel Was Burdened by an Actual Conflict

This Court has stated that "attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." *Holloway*, 435 U.S. at 486 (internal quotations & citation omitted) Having represented to the trial judge that petitioner was guilty, attorney Riddet "could not swallow [his] words and present [petitioner] as an innocent man." *Stites*, 56 F.3d at 1025. As the Court of Appeals explained in *Stites*, "nothing in our professional ethics permits an advocate to tell a court one set of facts today and a contradictory set of facts tomorrow." *Id.* at 1026.

Petitioner's counsel was ethically restrained from offering evidence which required him to assume petitioner's innocence. Under well established ethical provisions, an attorney may not present facts to a court which he or she believes are false, and is prohibited from taking any steps or in any assisting a client in presenting false evidence. *Nix v. Whiteside*, 475 U.S. at 166, 167-169, 106 S. Ct. at 994, 995; *see, e.g.*, California Rules of Professional Conduct, Rule 5-200(B); A.B.A. Model Rules, Rule 3.33. As this Court noted in *Holloway*, defense counsel has an "obligation to avoid assisting in the

presentation of what counsel had reason to believe was false testimony." *Holloway*, 435 U.S. at 480, n.4. That ethical restriction meant petitioner's attorney was not free to present affirmative evidence which required him to assume petitioner's innocence, because, based on the attorney's earlier public statements of petitioner's indisputable guilt, he would have to know, or have reason to believe, such evidence was false. *Nix v. Whiteside*, 475 U.S. at 166. While the attorney could challenge the government's evidence and argue it failed to prove petitioner's guilt, the attorney was not free to affirmatively offer defense evidence which assumed petitioner's innocence without violating the ethical rules that governed his conduct.

A conflict thus resulted, because the attorney's self-interest dictated that he limit his defense of petitioner to challenging the government's evidence in order to avoid the appearance of presenting evidence he knew or believed was false, and that self-interest conflicted with petitioner's interest, which dictated that decisions about his defense be made according to whether they would aid in achieving his acquittal. Indeed, the Court of Appeals acknowledged that petitioner's counsel had an actual conflict as a result of having represented to the trial judge, that petitioner was guilty and was also responsible for his sons' criminal activity. App B-4-5.

E. The Judge Knew or Reasonably Should Have Known of the Actual Conflict and Failed to Inquire Into the Conflict

The facts giving rise to counsel's actual conflict were statements he made to petitioner's trial judge that petitioner was guilty. The judge openly expressed her agreement with counsel's position, stating that petitioner was responsible for involving his sons in criminal activity. App C 18. Based on these circumstances, the trial judge reasonably should have known of the conflict.

That is especially true here, because the record confirms the judge was cognizant of the conflict. When the judge first refused Riddet's proposed substitution, she stated "[i]t seems to me I should rightly be concerned also about the possibility of a conflict here," and went on to explain, "I can only say that I'm left with the impression that the Fowlie juniors had strongly suggested, if not through counsel, through some of the filings with the court, that it was Dan Fowlie who is responsible for everyone's misconduct in this case." RT 11/19/90 p. 142-43.

Despite having expressed these concerns about the conflict, the judge inexplicably allowed Riddet's substitution on December 10, 1990. App C-19. The judge never conducted an inquiry into Riddet's self-interest conflict before or after permitting his substitution. In fact, the minute authorizing the substitution ruled there was no conflict. App C-19-20.

Thus, under the rule established by *Sullivan*, and acknowledged by *Wood*, petitioner is entitled to relief - - he has demonstrated his lawyer was burdened by an actual conflict of interest, the record establishes the trial judge knew or reasonably should have known of the conflict, and the judge failed to inquire into the conflict.

II.

The Court of Appeals Erred in Ruling That Counsel's Defense of Petitioner Through Cross-Examination and Argument Demonstrated His Failure to Offer Favorable Evidence of Petitioner's Innocence Was Not an Adverse Effect of the Actual Conflict

A. An actual conflict adversely affects a lawyer's performance, where a lawyer is confronted with a strategic decision that will impact his self-interest and the interest of his client differently, and he chooses the course of action that favors his own interest.

The requirement that a petitioner demonstrate "an actual conflict adversely affected his lawyer's performance" in order to establish a Sixth Amendment violation, was first established by the Court's opinion in *Sullivan*. *Id.*, 446 U.S. at 348. The Court contrasted the standard to its holding: "We hold that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a

defendant must establish that an actual conflict adversely his lawyer's performance." *Id.*, 446 U.S. 350. The *Sullivan* Court used *Glasser v. United States*, 315 U.S. 60 (1942), as an example of a case that would meet this standard. *Sullivan*, 446 U.S. at 348-349.

In *Glasser*, two defendants, Glasser and Kretske, had initially been represented by separate counsel. During the course of the trial, Kretske dismissed his lawyer and the trial judge then appointed Glasser's lawyer, Stewart, to represent Kretske as well. Stewart objected, unsuccessfully, on grounds that his representation of both Glasser and Kretske might lead the jury to link the two defendants together, and thus created a possible conflict of interest. After becoming counsel for both Glasser and Kretske, Stewart failed to cross-examine a government witness who linked Glasser to the conspiracy and failed to object to the admission of arguably inadmissible evidence. *Glasser*, 315 U.S. at 72-75. The Court viewed those failures to be the result of Stewart's desire to protect Kretske's interests by diminishing the jury's perception of his guilt, and as "indicative of Stewart's struggle to serve two masters . . . ." *Glasser*, 315 U.S. at 75.

In explaining *Glasser*, the Court in *Sullivan* stated that, "[s]ince this actual conflict impaired Glasser's defense, the Court reversed his convictions." *Sullivan*, 446 U.S. at 349. The Court in *Sullivan* also noted that "[o]nce the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of

the 'right to have the effective assistance of counsel.'" *Sullivan*, 446 U.S. at 349, *quoting*, *Glasser*, 315 U.S. at 76.

The *Sullivan* Court's discussion of *Glasser* as an example of a case in which an "actual conflict adversely affected counsel's performance," makes three points about the meaning and application of that standard.

First, an actual conflict exists where counsel is faced with a strategic decision which will impact the interests he represents differently. Thus, for example, an actual conflict existed in *Glasser* because Stewart was faced with deciding whether to cross-examine the witness who linked Glasser to the conspiracy, and the decision he made would impact the interests of Glasser and Kretse differently.

Second, counsel's actual conflict adversely affects his performance with respect to the client whose interest is disserved by the strategic decision. Again this point is illustrated by *Glasser*. Stewart's failure to cross-examine the government witness served Kretske's interests, but disserved Glasser's interests, and the Court ruled that the conflict resulted in a violation of Glasser's Sixth Amendment rights, but not Kretske's. *Glasser*, 315 U.S. at 76. The Court has emphasized on other occasions that the harmful effect of a conflict lies in what a lawyer fails to do. "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway*, 435 U.S. at 489-490.

Third, if an actual conflict adversely affected counsel's performance, prejudice is presumed and a Sixth

Amendment violation established. *Sullivan*, 446 U.S. at 349 ("The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'"), *quoting*, *Glasser*, 315 U.S. at 76. This point was also made explicit in *Strickland v. Washington*, 466 U.S. 668, 692 (1984)("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests,' and that 'an actual conflict adversely affected his lawyer's performance.'"), *quoting*, *Sullivan*, 446 U.S. at 350, 348.

B. Counsel's failure to offer available evidence to prove affirmatively petitioner was not guilty constituted an adverse effect of the actual conflict.

The conflicting interests in this case were Riddet's self-interest, which dictated that he limit his defense of petitioner to challenging the government's evidence of guilt, and refrain from offering evidence which assumed petitioner's innocence, and the interest of petitioner, which dictated that decisions about defense strategy and defense evidence be made according to whether they would aid petitioner in achieving an acquittal.

Petitioner demonstrated this actual conflict adversely affected his lawyer's performance by identifying available evidence that would have aided petitioner's defense, but harmed counsel's self-interest. That evidence included the following:

1. Evidence that the instrumentalities of marijuana smuggling found at petitioner's ranch were the property of the ranch manager Westmoreland, and not petitioner.

Police searched petitioner's ranch on March 1, 1985, and seized instrumentalities of marijuana smuggling. The prosecution offered these items at trial as the property of petitioner and thus evidence of his guilt.[3]

Evidence was available to petitioner's counsel that was relevant to prove the incriminating items were the property of the manager of the ranch, Wade Westmoreland, and not petitioner. The day before petitioner's ranch was searched, Westmoreland's apartment was searched and police seized a large quantity of marijuana, $73,000 cash, loaded and unloaded firearms, and ledgers reflecting large scale sale of controlled substances. As noted above, Westmoreland was the manager of the ranch, and when arrested, Westmoreland had keys to the ranch on his personal key chain. App C-15. Police used Westmoreland's connection to the ranch, to obtain a warrant to search the ranch the very next day. App C-15. Westmoreland later filed a motion to suppress the items seized at petitioner's ranch and submitted a signed declaration demonstrating he had standing to assert

---

[3] Among the items were an Uzi firearm with a flash suppressor, bullet proof vests, money counter, counterfeit bill detector and other incriminating items of drug paraphernalia.

a Fourth Amendment interest as to a search of the property. Petitioner's counsel could have used this same evidence, (*i.e.*, the facts set forth in the search warrant affidavit and the statements in Westmoreland's declaration), to connect Westmoreland to the ranch and the instrumentalities of marijuana smuggling which were seized at the ranch. App C-15.

Petitioner's counsel did not use any of this evidence. Instead, counsel attempted to dispute the prosecution's claim that the items belonged to petitioner by pointing to the absence of direct evidence connecting petitioner to the items or the ranch[4] and eliciting in cross-examination the names of three other people who might have had access to the ranch ER 578-79.

2. Evidence that Westmoreland, and not petitioner, was the manager of the conspiracy, to prove petitioner was not guilty of the CCE charge.[5]

---

[4] Counsel relied on what the prosecution witnesses had not established -- "[petitioner] was not seen by any of the agents who searched the ranch. There's also no evidence by way of surveillance that he was seen on or about that ranch in the time period of the search, that is, March of 1985." ER 578.

[5] The CCE charge required the government to prove, *inter alia*, that he occupied a position of manager, leader or organizer with respect to five people, in the commission of

The same evidence discussed above, including the statements of law enforcement officers that identified Westmoreland as the manager of the ranch, as well as Westmoreland's guilty plea to possession of marijuana for sale in the related state prosecution, could have been used by petitioner's counsel to implicate Westmoreland as the manager of the conspiracy. In fact, while petitioner was in Mexico fighting extradition, Riddet provided petitioner's Mexican counsel with an affidavit that placed responsibility for the criminal activity at the ranch on Westmoreland, and exculpated petitioner. ER 170.

Petitioner's counsel did not use any of this evidence, even though the affidavit he supplied for petitioner's extradition hearing in Mexico confirmed the validity of such a strategy. Instead, counsel attempted by cross-examination of the government's cooperating witnesses to shift responsibility to them for the marijuana activities at the ranch.

3. Evidence that petitioner left the U.S. more than a week before the search of his ranch.

The prosecution contended that immediately after and in response to the search of his ranch, petitioner fled to Mexico and that his immediate flight proved he was guilty. ("[R]ight after that ranch search, he fled to Mexico.

---

a series of narcotics felonies, and the jury had to agree unanimously on the five people whom he managed, lead or organized. See 21 U.S.C. § 848(c).

If he was not guilty, if he had nothing to do with that, why did he go to Mexico?"; "And finally, ladies and gentlemen, why did the defendant flee to Mexico suddenly if he is not guilty?" ER 582, 583). Petitioner's counsel had available evidence which he could have offered to prove petitioner left the United States for his home in Costa Rica more than a week before the search of the ranch. This evidence included petitioner's passport, which showed that he left the United States ten days before the search and arrived in Costa Rica on February 19, 1985. ER 13, 26.

Petitioner's counsel never used the passport. Instead, he noted the absence of testimony placing petitioner at the ranch on the day of the search to defend against the prosecution's allegation that petitioner's guilt was proven by his sudden flight to Mexico after the search.

4. Evidence petitioner had loaned Cooper hundreds of thousands of dollars for real estate investments and other legitimate purposes, to provide an innocent explanation for the money Cooper paid to petitioner.

The prosecution presented evidence of payments from Cooper to petitioner, and testimony by Cooper that the payments were for marijuana. Petitioner's counsel had available evidence which he could have offered to prove Cooper owed petitioner large sums of money for legitimate loans, which would have provided an innocent explanation for the payments. That evidence included the contracts documenting the loans, their amounts and

purposes. ER 13, 584.

Petitioner's counsel did not present any documents for any of the loans. Instead, he cross-examined Cooper about the loans. Even after Cooper denied the loans, except for one which he contended had long been paid, petitioner's counsel still did not offer the contracts and related documents. ER 409-11.

C. Petitioner's showing that counsel's failure to offer evidence of innocence was an adverse effect of his actual conflict is not rebutted by counsel's defense of petitioner through cross-examination and argument.

The Court of Appeals rejected petitioner's contention that his counsel's failure to use the evidence discussed above demonstrated his actual conflict adversely affected his performance. The Court of Appeals gave its reasons for this ruling in two sentences: "[Petitioner] fails to meet his burden to demonstrate, with a factual showing on the record, that the self-conflict adversely affected his attorney's performance. [citation omitted] Rather, the record demonstrates that [petitioner's] attorney argued [petitioner's] innocence, vigorously cross-examined the government's witnesses, and attempted to shift blame to several viable suspects." Appendix B - 5.

The efforts of petitioner's counsel cited by the Court of Appeals to support its ruling - i.e., he argued petitioner's innocence, vigorously cross-examined the government's witnesses and attempted to shift blame to

several viable suspects - do not legally or logically demonstrate that his failure to offer evidence which required him to assume petitioner's innocence was not an adverse effect of his actual conflict. None of the actions cited by the Court of Appeals were inconsistent with counsel's self-interest. That is, they involved challenging the government's evidence of guilt, which counsel could do without appearing to offer evidence he knew or had to believe was false. Counsel's use of strategies that were consistent with his self-interest does not mean that his failure to offer evidence which would have aided petitioner's defense but conflicted with his self-interest was not an adverse effect of his actual conflict. In fact, counsel's exclusive use of strategies that were consistent with his self-interest, and avoidance of those which were inconsistent with his self-interest, supports petitioner's showing that counsel's actual conflict adversely affected his performance.

This includes what the Court of Appeals referred to as counsel having argued petitioner's innocence. App B-5. Counsel's assertions of petitioner's innocence equated petitioner's "innocence" with the government's failure to prove him guilty beyond a reasonable doubt, not with actual innocence. See RT 91-92 ("When this case is over, I fully expect that you will find from the evidence that the charges which have been brought against Mr. Fowlie have not been proven and that he is innocent of these charges.")

Nor does the vigorous manner in which counsel executed these strategic choices demonstrate that his

failure to offer affirmative evidence was not an adverse effect of his actual conflict. Counsel may well have made the best effort he could to achieve an acquittal within the limits his self-interest imposed on petitioner's defense. Counsel may have tried as hard as he could to win with one hand tied behind his back, but that does not mean his performance was not adversely affected.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the questions presented in this petition.

Respectfully submitted,

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, California 90405
(310) 399-3259

Counsel for Petitioner
DANIEL JAMES FOWLIE

* Counsel of Record

Supreme Court, U.S.
FILED

0 1 5 8 3 SEP 24 2001

OFFICE OF THE CLERK

No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DANIEL JAMES FOWLIE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, California 90405
(310) 399-3259

Counsel for Petitioner
DANIEL JAMES FOWLIE

* Counsel of Record

61 pp

INDEX TO APPENDIX

Page

APPENDIX A

Order of United States Court of Appeals for the Ninth Circuit Denying Appellant Daniel James Fowlie's Petition For Rehearing. Filed June 26, 2001 ..... A-1

APPENDIX B

Memorandum of United States Court of Appeals for the Ninth Circuit Affirming District Court's Denial of Appellant Daniel James Fowlie's Habeas Petition De Novo. Filed March 9, 1999 ..... B-2

APPENDIX C

Order Denying Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody. Filed October 15, 1997 ..... C-6

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-56602**
	)	
Plaintiff-Appellee,	)	DC #
	)	CV-95-802-AHS
v.	)	CR-88-083-AHS
	)	
DANIEL JAMES FOWLIE,	)	**ORDER**
	)	
Defendant-Appellant.	)	
	)	

Filed June 26, 2001

Before: D.W. NELSON, KOZINSKI, and TROTT, Circuit Judges.

The Court regrets the delay in deciding this petition for rehearing, a delay caused by internal failure promptly to circulate it to the panel. The Court has carefully reviewed the briefs in the light of the petition and new cases cited, and continues to conclude that the resolution of this case was correct.

The petition for rehearing is **DENIED**.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 97-56602**
	)	
Plaintiff-Appellee,	)	DC #
	)	CV-95-802-AHS
v.	)	CR-88-083-AHS
	)	
DANIEL JAMES FOWLIE,	)	
	)	
Defendant-Appellant.	)	
	)	

MEMORANDUM[1]

Filed March 9, 1999

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted February 1, 1999
Pasadena, California

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

Before: D.W. NELSON, KOZINSKI, and TROTT, Circuit Judges.

Daniel James Fowlie ("Fowlie") appeals from the denial of his habeas corpus motion under 28 U.S.C. § 2255 (1994), claiming ineffective assistance of trial counsel due to alleged conflicts of interest. We have jurisdiction under 28 U.S.C. § 1291 (1994) and 28 U.S.C. § 2253 (1994), and we **AFFIRM**.

The facts are well known to the parties and not repeated here. We review the district court's denial of a habeas petition de novo. United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997). Factual findings underlying the district court's decision are reviewed for clear error. United States v. Span, 75 F.3d 1383, 1386 (9th Cir. 1996).

The Sixth Amendment right to trial counsel encompasses a right to conflict-free trial counsel. Wood v. Georgia, 450 U.S. 261, 271 (1981). Where a defendant fails to object at trial to his lawyer's conflict, the trial may be overturned only by the defendant's factual showing on the record that an actual conflict adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); Morris v. California, 966 F.2d 448, 455 (9th Cir. 1992). The mere possibility of a conflict of interest is insufficient. Id. Even where a defendant can make the required showing, we will not overturn the verdict if the defendant waived his right to a conflict-free trial. Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994).

Fowlie contends that his attorney was conflicted due to the prior representation of Fowlie's son for a related crime.

We conclude that the district court did not err in determining that Fowlie waived his right to contest this alleged conflict. See Garcia, 33 F.3d at 1195. The district court found that Fowlie's waiver was knowing and intelligent, a finding which we review for clear error, Garcia, 33 F.3d at 1195 n.3; Doganiere v. United States, 914 F.2d 165, 167 (9th Cir. 1990), and which Fowlie does not demonstrate should be reversed. The voluntariness of Fowlie's waiver is apparent from the record.

Fowlie also contends that his attorney was conflicted due to the prior representation of Wade Westmoreland. The district court did not err in determining that Fowlie failed to meet his burden of demonstrating an actual conflict with an adverse effect on his attorney's performance. Fowlie's attorney had represented Westmoreland on charges from a similar crime, and Fowlie contends that evidence from or regarding Westmoreland should have been introduced as part of Fowlie's defense. However, he "has introduced no evidence demonstrating that [Westmoreland] might have been helpful to [him], and that [his] attorney therefore faced a conflict of interest" in representing Fowlie. Morris 966 F.2d at 455. Fowlie's extensive speculation about evidence that might have been introduced to his benefit at trial does not constitute a factual showing of an actual conflict. Id. at 455-56.

Fowlie argues that his attorney was also self-conflicted. An attorney may be ineffective due to a sel-conflict if, while representing the defendant, the attorney was "required to undermine, criticize, or attack his or her own work product from the previous case." Maiden v. Bunnell, 35 F.3d 477, 481 (9th Cir. 1994). The record indicates that

Fowlie's attorney had made statements during his representation of Fowlie's son that indicated Fowlie's own guilt.[2] Fowlie fails to meet his burden to demonstrate, with a factual showing on the record, that the self-conflict adversely affected his attorney's performance. See Morris, 966 F.2d at 455. Rather, the record demonstrates that Fowlie's attorney argued Fowlie's innocence, vigorously cross-examined the government's witnesses, and attempted to shift the blame to several viable suspects.

Accordingly, we **AFFIRM** the judgment of the district court.

---

[2] Although we conclude that Fowlie waived his right to contest the conflict from his attorney's prior representation of his son, the record does not indicate that Fowlie was aware that his attorney had argued Fowlie's own guilt during the course of that representation. We are obliged to indulge every presumption against the waiver of a fundamental right, United States v. Allen, 831 F.2d 1487, 1498 (9th Cir. 1987), and accordingly hold that Fowlie's waiver does not reach his attorney's self-conflict.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	) SA CV 95-802 AHS
	) SA CR-88-083-AHS
Plaintiff,	)
	)
v.	)
	)
DANIEL JAMES FOWLIE,	)
	)
Defendant.	)
	)

ORDER DENYING MOTION UNDER
28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR
CORRECT SENTENCE BY A PERSON
IN FEDERAL CUSTODY

Filed October 15, 1997

I.

PROCEDURAL HISTORY

On October 2, 1995, defendant filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. On July 8, 1996, the government filed its opposition. On August 7, 1996, the

defendant filed his reply.

On May 5, 1997, the Court held a hearing on defendant's motion. Defendant was represented by William J. Genego, Esq. Elana Shavit Artson appeared on behalf of the United States. At the hearing the Court directed the parties to lodge proposed Findings of Fact and Conclusions of Law, following the submission of which the motion would be submitted for ruling. The defendant lodged Proposed Findings of Fact and Conclusions of Law on June 10, 1997, and the government lodged Proposed Findings of Fact and Conclusions of Law on July 30, 1997.

The Court hereby denies on defendant's motion, discussing first defendant's claim of double jeopardy and second defendant's claims of ineffective assistance of counsel.

II.

DISCUSSION

A. Double Jeopardy

Defendant raises two separate claims that his conviction violates the constitutional protection against double jeopardy, claiming that being subjected to a civil forfeiture and criminal prosecution and claiming that being subjected to a jeopardy tax assessment and criminal prosecution both violated his protections against being placed in double jeopardy. He concludes that his criminal prosecution was, therefore, unconstitutional.

1. Double jeopardy violation due to civil forfeiture

Civil forfeitures in accordance with 21 U.S.C. §§ 881(a)(6) & (a)(7) are not punishment, United States v. Ursery, ____ U.S. ____, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), and, accordingly, cannot constitute double jeopardy.

2. Double jeopardy violation due to jeopardy tax assessment

As to defendant Fowlie's claim that his conviction was in violation of the Double Jeopardy Clause, because the criminal conviction was a subsequent punishment, the Court rules that defendant fails to demonstrate that the jeopardy tax assessment constituted a punishment.

A tax can be considered a punishment for double jeopardy purposes if the intent of the tax is for penal and prohibitory purposes rather than the gathering of revenue. Dept. of Revenue of Montana v. Kurth Ranch, ____ U.S. ___, 114 S.Ct. 1937, 1947 (1994). While neither a high rate of taxation nor an obvious deterrent purpose automatically mark a tax as a form of punishment, such considerations are relevant. Id. at 1946.

In this case, defendant has made no showing that the jeopardy tax assessment was punitive in nature. Defendant has only provided copies of IRS documentation showing that the jeopardy tax assessment was made October 12, 1988, and a copy of a notice of levy sent to defendant's attorneys in Costa Mesa providing notice that defendant owes over $10 million to the government. Defendant provides no further

documentation to support his assertion that the tax was assessed in an arbitrary manner and without a meaningful purpose. Accordingly, defendant has not established he is entitled to relief pursuant to § 2255 based upon this claim.

B. Conflict of Interest

Fowlie contends that trial counsel Riddet had three separate and distinct conflicts of interest while representing him: from a prior representation of a Wade Westmoreland in a related state court proceeding ("Westmoreland conflict"); from the prior representation of defendant's son, Gus Fowlie, in a related federal criminal proceeding ("Gus Fowlie conflict"); and, from the positions Riddet took while representing defendant's son, Gus Fowlie, in court before the same judge as before whom defendant was proceeding ("Riddet self-conflict"). He concludes that he was denied his Sixth Amendment, constitutional right to a conflict-free counsel and, therefore, his conviction must be vacated.

After consideration of the briefs filed by the parties, the legal authorities cited to the Court by counsel for the parties, the arguments of counsel thereon, and subsequent independent research, the Court now modifies, by strike-outs and insertions, and, as modified, signs and files the Findings of Fact and Conclusions of Law lodged by both parties. Both sets of findings and conclusions, along with this Order, must be read together, and, as so read, point to denial of defendant's motion.

The Court concludes that "[I]n order to prove a violation of his Sixth Amendment right to conflict-free counsel, 'a defendant who raised no objection to the conflict

at trial must demonstrate that an actual conflict adversely affected his lawyer's performance." United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995), cert. denied, ____ U.S. ____, 117 S.Ct. 185 (1996). The defendant must prove an actual conflict through a factual showing on the record. Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994). Once the defendant has shown an actual conflict, the defendant need only demonstrate "that some effect on counsel's handling of particular aspects of the trial was likely." Id. In this case, no such likelihood appears, and the cases, adhering to the foregoing standards, do not compel setting aside defendant's convictions.

In a review of the circumstances and the evidence presented at trial, the Court finds that the prior representation of Gus Fowlie and Wade Westmoreland raised at best a possibility of conflict, but no actual conflict arose. Furthermore, even if there were a conflict, defendant fails to establish that Riddet's performance was adversely affected or that some effect was even likely. See Plaintiff's Findings of Fact and Conclusions of Law, ¶¶ 10, 11, and 32 through 35.

As to the alleged conflict from defendant's counsel's own self interest, defendant's arguments are pure speculation. Defendant contends that his counsel previously acknowledged defendant's guilt during representation of Gus Fowlie. Defendant argues that this alleged ethical dilemma caused counsel to be unable to argue affirmatively that defendant is innocent because it would force counsel to take inconsistent positions before the same judicial officer. Not every perceived ethical problem creates a constitutional conflict of interest. Maiden v. Bunnell, 35 F.2d 477, 481 n.4 (9th Cir. 1994). In this case, defendant has failed to establish that a

ethical dilemma existed, let alone that a conflict of interest for constitutional purposes arose. As the government urges, defendant's attorney consistently argued that others, and not the defendant, were behind the illegal scheme. Counsel urged that defendant was legitimate businessman. See Plaintiff's Findings of Fact and Conclusions of Law, ¶ 27.

Even if there were a conflict, the conclusion that evidence which defendant now contends that counsel failed to pursue was due to the alleged conflict is merely conjecture supported by no proof. Defendant's position can be summarized as: counsel failed to make certain arguments and failed to offer certain evidence because counsel did not want to argue defendant's innocence affirmatively. Defendant's position, however, is merely one inference which can be drawn from the fact counsel did not offer the specific evidence or make certain arguments defendant now contends were vital. Defendant fails to establish that counsel's failure to do so was anything other than counsel's trial strategy.

Furthermore, defendant fails to offer evidence to support his argument that any item of evidence should have been offered or that any position which defendant urges should have been taken to prove his innocence; the argument rests on mere conjecture. See Plaintiff's Findings of Fact and Conclusions of Law, ¶ 28(a) - (d). Defendant does not establish, therefore, that counsel's performance was likely affected by the alleged conflict of interest.

Accordingly, the Court finds that defendant was not deprived of his Sixth Amendment Right to a conflict-free counsel as his attorney was not operating under any conflict of interest and, even if there were a conflict, counsel's

performance was not likely affected by it.

III.

CONCLUSION

Pursuant to the foregoing, the Court finds that defendant was not put twice into jeopardy by virtue of the criminal prosecution following either the civil forfeiture or the jeopardy tax assessment. Further, the Court finds that defendant was not denied his Sixth Amendment right to a conflict free counsel. Accordingly, the Court denies defendant's motion to set-aside, vacate, or correct his sentence pursuant to 28 U.S.C. § 2255.

On the issue of conflict of interest, the Court adopts the modified Findings of Fact and Conclusions of Law filed this date.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties.

Date: October 15, 1997.

Alicemarie H. Stotler
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

WILLIAM J. GENEGO, ESQ. (No. 103224)
Law Offices of William J. Genego
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401-1198
(310) 394-5802

Attorney for Defendant
Daniel James Fowlie

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	) SA CV 95-802 AHS
	) SA CR-88-083-AHS
Plaintiff,	)
	)
v.	)
	)
DANIEL JAMES FOWLIE,	)
	)
Defendant-Movant.	)
	)

~~DEFENDANT-MOVANT'S PROPOSED~~ ***AHS***[1]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AS MODIFIED BY COURT

[1] Text appearing in bold, italicized type represents the District Judge's handwritten interlineations and strikeouts are often marked with her initials (AHS).

VOL. I

Filed October 15, 1997

At the conclusion of the oral hearing on May 5, 1997, the Court directed the parties to submit proposed conclusions of law, as well as proposed findings of fact as to each of the three areas of conflict identified in the defendant-movant's motion and supporting memorandum. *See* Reporter's Transcript of Proceedings, May 5, 1997, at 73 (attached as Exhibit A).

Accordingly, Mr. Fowlie, by counsel, submits the following proposed findings of fact and proposed conclusions of law follow.

Respectfully submitted,

June 9, 1997

William J. Genego
William J. Genego, Esq.

Attorney for Defendant
Daniel James Fowlie

PROPOSED FINDINGS OF FACT

A. The Attorney's Representation Of Westmoreland

1. On February 28, 1985, police executed a search warrant at Wade Westmoreland's residence in Laguna Beach, California, where they discovered 50 pounds of marijuana, approximately $73,000 in U.S. currency, ledgers showing large scale sales of controlled substances, and several firearms, loaded an unloaded. *See* Defense Exhibit K ("DEX") (Affidavit in Support of Search Warrant).

2. On March 1, 1985, law enforcement authorities applied for a warrant to search the property known as Rancho Del Rio, in Orange County, California. DEX: K. The facts stated in the affidavit to support the request to search Rancho Del Rio included the seizure of the above listed items of evidence from Westmoreland's residence and additional documents that were seized showing that Westmoreland was the "ranch manger" of Rancho Del Rio, that he possessed keys to Rancho Del Rio on his personalized key ring when he was arrested, and information that he was a large scale distributor of cocaine. DEX: K.

3. The authorities obtained the requested warrant and searched Rancho Del Rio on March 1, 1985. DEX: K.

4. The evidence that was seized at Rancho Del Rio was used as the basis for filing a two-count felony complaint against Westmoreland in March, 1985, consisting of conspiracy to distribute narcotics and possession of marijuana for sale. DEX: I (First Amended Felony Complaint, March 5, 1985).

5. Westmoreland was represented by private counsel, James D. Riddet. DEX: J (Declaration of James Riddet, executed June 13, 1989).

6. Daniel James Fowlie, Sr. ("Dan Fowlie, Sr.") was charged in that same case with Westmoreland as a codefendant and coconspirator. DEX: I.

7. Westmoreland, represented by attorney Riddet, filed a motion to suppress the items seized at Rancho Del Rio, which was granted. DEX: L. (order granting motion to suppress).

8. After the motion was granted, Westmoreland entered a guilty plea to the second count, possession for sale of marijuana, on September 18, 1985. DEX: M (guilty plea of Westmoreland).

B. The Attorney's Representation Of Gus Fowlie

9. In June, 1989, Gus Fowlie (son of Dan Fowlie, Sr.) was charged, in a twenty-five count indictment that was returned in the Central District of California, with conspiracy to possess with intent to distribute marijuana and related offenses. DEX: N (Indictment, No. SA CR 88-82-AHS). A number of other individuals were charged as defendants in that same indictment. *Id.* Dan Fowlie, Sr. was identified in the indictment as an unindicted coconspirator. *Id.*

10. Gus Fowlie was represented by attorney James D. Riddet, the same attorney who had represented Westmoreland. DEX: O (RT: 4/14/89 at 4).

11. Attorney Riddet negotiated a plea bargain for Gus Fowlie that allowed him to plead guilty to one count of a redacted indictment, charging him with conspiracy to possess with intent to distribute.

12. As a condition of the plea, Gus Fowlie implicated his father, Dan Fowlie, Sr., in the conspiracy, by agreeing that his role in the conspiracy was "assisting in the transportation, storage, packing and distribution of marijuana at the direction of Daniel James Fowlie and others." DEX: P (plea agreement and redacted indictment).

13. Gus Fowlie was sentenced on September 25, 1989. At the sentencing hearing, attorney Riddet minimized Gus Fowlie's offense by assigning responsibility for his conduct on his father, Dan Fowlie, Sr. Attorney Riddet told the Court, "It would be foolish to dispute the fact that Mr. Fowlie senior was running an extremely large marijuana organization. And what concerns me is (sic.) counsel for Gus Fowlie is that that might rub over onto Gus Fowlie who was indeed a minimal participant, nothing more than unfortunately the son of Dan Fowlie senior." DEX: A at 24:6-12 (where Riddet expressed his concern that Daniel Fowlie's obvious guilt "might rub over onto Gus who was indeed a minimal participant, nothing more than unfortunately the son of Dan Fowlie senior." *Id.* at 24:6-12). Riddet further argued that Gus Fowlie's only profit was at most $200, which he received on the three or four occasions in which he had reluctantly assisted his father. *Id.* at 24:13-25:9. Attorney Riddet partly justified Gus Fowlie's willingness to go along with his father's illicit requests by pointing out that Gus Fowlie viewed his father as "an extremely authoritative figure," *id.* at 25:13-14, and Riddet noted that others described Dan Fowlie,

Sr. as a "domineering type individual," *id.* at 25:16, who would get angry at his sons' refusal to assist him in his drug trafficking activities. *Id.* at 25:21-11.

14. After attorney Riddet's sentencing remarks, and before imposing sentence on Gus Fowlie, the Court stated that Dan Fowlie, Sr., had "snar[ed] both" Gus Fowlie and his brother into the marijuana operation. Id. at 33:17. The Court hen sentence Gus Fowlie to 24 months' imprisonment. DEX: Q (Judgement and Commitment Order).

C. The Attorney's Representation Of Dan Fowlie, Sr.

15. A twenty-six count indictment against Dan Fowlie, Sr. was returned by a federal grand jury in the Central District of California on November 30, 1988. Dan Fowlie, Sr. was charged in the indictment with operating a continuing criminal enterprise ("CCE") (21 U.S.C. § 848), and elated marijuana, tax and CTR offenses.

16. Dan Fowlie, Sr.'s indictment included the same conduct for which Gus Fowlie, his son, had already been convicted and sentenced. DEX: R (Government's Memorandum of Law Regarding Substitution of Counsel, 11/21/90, at 4 ("although father and son were charged in separate indictments, the acts underlying the conspiracies alleged in the two cases are substantially identical.")).

17. Dan Fowlie, Sr. was initially represented in the case by appointed counsel and subsequently filed a motion requesting that private counsel, Michael Pancer of San Diego, be permitted to represent him, together with attorney James Riddet, who attorney Pancer had selected as local counsel.

DEX: S (Defendant's Motion To Retain/Change Attorneys); Fowlie Decl., ¶¶ 4-5.

18. The government filed an opposition to the proposed substitution of Mr. Pancer and requested that the Court disqualify him as Mr. Fowlie's counsel, because he had represented Ivan Summers, whom the government planned to call as a witness against Mr. Fowlie. DEX: R, at 7-10. The government's opposition also stated that it believed Mr. Riddet had a conflict and expressed "serious reservations as to whether it is possible for [Mr. Fowlie] to fully and effectively waive the conflicts." *Id.* at 3, 10-11.

19. A hearing on the proposed substitution was held on November 26, 1990. During the hearing, the Court disqualified Mr. Pancer from representing Mr. Fowlie. *See* Ex. T, (RT: 11/26/90 at 39:4-9).

20. On December 4, 1990, attorney Riddet filed a motion with Mr. Fowlie's appointed counsel to continue the trial date and to allow him to substitute into the case as Mr. Fowlie's attorney. DEX: U (Notice of Motion to Continue Trial and Substitute Counsel, 12/4/90). Included with the motion were declarations signed by Dan Fowlie, Sr. and Gus Fowlie that were submitted as proposed conflict waivers.

21. At the hearing on the renewed motion for substitution of counsel and for a continuance, the Court granted the motion to substitute counsel. DEX: V (RT: 12/10/90, at 28:14 - 29:19).

22. After the hearing, the Court issued a minute order ruling that it found no conflict of interest existed with respect

to Mr. Riddet's representation of Mr. Fowlie and also granting the requested continuance. DEX: W (Minute Order, 12/10/90) ("Court hears further from all counsel re defendant's motion to continue and substitute counsel, finds no conflict exists re Attorney Riddet . . . .")

23. Attorney Riddet received the $200,000 retainer that had been paid to Mr. Pancer for Dan Fowlie's Sr.'s representation, and in total more than $300,000 was paid to the attorney on Mr. Fowlie's behalf. *See* Fowlie Decl., ¶ 11 and Ex. A to Fowlie Decl.

PROPOSED CONCLUSIONS OF LAW

B. General Principles Of Law Governing Conflict Claims

24. The Sixth Amendment guarantees a criminal defendant the right to be represented by counsel whose loyalty is undivided. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1102 (1981).

25. A conflict of interest may arise whenever an attorney's duty of loyalty to zealously advocate and protect the interests of a client is impaired; the conflict may be caused either by a competing duty of loyalty or duty of confidentiality the attorney owes to another client, or by the attorney's own self-interest and concerns. *See*, *Manhalt v. Reed*, 847 F.2d 576, 580 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988) (citing cases) (holding that a conflict of interest between a client and the attorney ***in exposing the attorney's own guilt AHS*** is treated like a conflict between clients).

26. Because an attorney owes a duty of loyalty to past as well as present clients, a conflict may arise in both concurrent and successive representation of clients in the same or related matters. *See Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980) (concurrent representation); *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (successive representation); *Wheat*, 813 F.2d 1399, 1402 n.1 (9th Cir. 1987) (a "substantial relationship between successive representations" may raise concern about divided loyalties and conflicts of interest).

27. A conflict exists in successive representations if an attorney is "incapable of diligently representing his client." *Wheat*, 813 F.2d at 1402. *See also*, *Thomas v. Mun. Court of Antelope Valley J.D.*, 878 f.2d 285, 289-90 (9th Cir. 1989) (successive representations of clients in substantially related matters implicates duty of confidentiality to first client and duty of loyalty to both clients, which can adversely affect the attorney's ability to represent second client).

28. To establish a violation of the Sixth Amendment right to conflict-free representation, "a defendant who raised no objection [to the conflict] at trial must demonstrate that an actual conflict adversely affected his lawyer's performance." *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) *quoting, Cuyler v. Sullivan*, 446 U.S. at 348, 100 S. Ct. at 1718.

29. The defendant must prove an actual conflict through a factual showing on the record. *Sanders*, 21 F.3d at 1452, (citing *Morris v. California*, 966 f.2d 448, 455 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 96 (1992)).

30. Once the defendant has shown an actual conflict, the defendant need only demonstrate "that some effect on counsel's handling of particular aspects of the trial was likely" to be entitled to relief. *Sanders*, 21 F.3d at 1452 (citations omitted; internal quotation marks omitted); *see also*, *Frazer v. United States*, 18 F.3d 778, 787 (9th Cir. 1994) (concurring opinion) ("defendant must show that the conflict 'likely' affected counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant.") (citation omitted).

31. Although there is no controlling test for determining whether an actual conflict adversely affected an attorney's performance, or whether there are particular aspects of counsel's performance that the conflict likely affected, that requirement is established by showing that the attorney had to make a choice between alternative courses of action available to him or her, and the interests of one client favored a course of action that was different than the alternative course of action that was favored by the interests of the other client.

32. When it is shown that the conflict is likely to have affected the attorney's performance, prejudice is presumed, because the injury to the defendant may lie not in what the attorney did, but in what the attorney failed to do, given his or her conflicted loyalty. *See*, e.g., *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1251-52 (9th Cir.), *cert. denied*, 493 U.S. 872 (1989) (citations omitted); *see also*, *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) ("in a case [involving a conflict of interest] the evil . . . is in what the advocate finds himself compelled to *refrain* from doing) (emphasis in original) (quoting *Holloway v. Arkansas*, 435

U.S. 475, 490, 98 s. Ct. 1173, 1181-82 (1978)).

33. Consistent with the rule that no showing of prejudice is required, "[t]he strength of the prosecution's case is not relevant to whether counsel's performance was adversely affected." *United States v. Mett*, 65 F.3d at 1535, *citing*, *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981).

34. In contrast to an ineffective assistance of counsel claim based on an attorney's actual ineffectiveness, which requires a defendant to demonstrate there is a reasonable probability that the outcome of the proceeding would have been different but for the attorney's professionally unreasonable performance, to establish an ineffective assistance of counsel claim based on a conflict of interest, a defendant is not required to demonstrate a relationship between the probable outcome of the proceeding and the effect the conflict likely had on the attorney's performance. *See*, *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L.Ed.2d 674 (1984) (conflict claim does not require showing of prejudice as "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.")

35. In some circumstances, a defendant may be permitted to waive a conflict of interest, if the waiver is knowing, intelligent and voluntary. *United States v. Allen*, 831 F.2d 1487, 1498 (9th Cir. 1987). What is dispositive is not the conflict the defendant purports to waive, but the potential for conflict, waived or unwaived. *United States v. Rewald*, 889 F.2d 836, 857-58 (9th Cir. 1989), amended, 902 F.2d 18 (9th Cir.), *amended*, 902 F.2d 18 (9th Cir.), *cert.*

denied, 498 U.S. 819 (1990), *cited with approval*, *United States v. Baker*, 10 F.3d 1374, 1399 (9th Cir. 1993).

36. The burden of proving a valid waiver lies with the government, and the court must "indulge every reasonable presumption against the waiver." *United States v. Allen*, 831 F.2d at 1498.

~~C. The Attorney's Conflict~~

~~37. Whether or not the statements made by Attorney Riddet to the Court on behalf of Gus Fowlie concerning Dan Fowlie, Sr. were wholly accurate, Riddet's affirmation of Daniel Fowlie, Sr.'s guilt, as the leader of the operation, and as a man who would stop at nothing, placed Riddet in an actual conflict when he was called upon to advocate Daniel Fowlie, Sr.'s innocence for two reasons.~~

~~38. A lawyer has a duty to refrain from making false statements of facts or offer evidence he or she knows to be false. In this case, Riddet could not represent to the Court one set of facts in defense of Gus Fowlie and subsequently make factual claims in defense of Dan Fowlie, Sr. that directly contradicted his earlier representations without violating his duties to the Court. However, to vigorously advocate Dan Fowlie, Sr.'s innocence, Riddet would have had to advance an interpretation of the evidence wholly inconsistent with his earlier factual claims and to portray Daniel Fowlie, Sr. in a completely different light from what he had done earlier before the Court.~~

~~39. An important element of an attorney's professional life is to establish and maintain a reputation with the courts for candor, trustworthiness and responsibility. An attorney in Mr. Riddet's position would know that his conduct at Dan Fowlie Sr.'s trial would affect the Court's perception of his credibility and personal integrity. Thus, independently of Mr. Riddet's interest in not violating professional rules of ethics, he had a substantial interest in avoiding appearing to the Court as the kind of lawyer who would, on one occasion, argue one set of facts to the Court and, on another, present a completely opposite version of the same facts. Having previously told the Court that Dan Fowlie, Sr. was guilty of, indeed had prime responsibility for, the charges Fowlie was disputing, the attorney could not take a position which would require him to accept and promote Dan Fowlie, Sr.'s innocence to the Court, without jeopardizing his credibility with the Court.~~

~~40. The nature and source of the attorney's conflicting interest is such that it would affect all aspects of his defense of Dan Fowlie, Sr..~~

~~41. The defendant has also made a showing that his attorney's actual conflict adversely affected his attorney's performance, in that he has identified particular aspects of his attorneys's performance that the conflict likely affected. Defendant has also demonstrated that the conflict adversely affected his lawyer's performance in that he has identified alternative courses of action the attorney had available to him and chose between, as to which the interests of the clients favored the attorney choosing different alternatives. The particular aspects that the conflict likely affected, and the alternative courses of action available to the attorney as to~~

which the clients' interests differed, included the following:

(a) Shifting responsibility to Westmoreland for the incriminating items seized at Rancho Del Rio by argument and by introducing the available evidence that supported that strategy.

The items seized during the March 1, 1985, search of Rancho Del Rio, included an Uzi firearm with a flash suppressor, bullet-proof vests, money counter, counterfeit bill detector and other incriminating items of drug paraphernalia. The government argued those items belonged to Mr. Fowlie and that their presence at the ranch showed he was guilty. *See, e.g.*, RT: 3271-3273, 3424 (attached as Exhibit Y).

An alternative strategy available to the defense was to shift responsibility to Westmoreland for the ownership and control of these items. While this alternative would have been consistent with Mr. Fowlie's interests, it was contrary to the attorney's interests. The attorney had to be concerned that if he were to present affirmative evidence and argue that another person was responsible for those items, he would be perceived as arguing facts that he knew to be false. Not only would this harm the attorney's personal and professional reputation with the presiding judge, but the attorney would also run the risk of violating Rule 5-200(B) of the California Rules of Professional Conduct. The attorney did choose to pursue the strategy of shifting responsibility to Westmoreland, and pursued a different strategy of offering, in his summation, the names of three individuals who, according to the testimony of government's witnesses, might have had access to the ranch. DEX. X (R.T. 3411).

~~(b) A strategy available to the defense, especially with respect to the CCE charge (21 U.S.C. § 848), was to shift responsibility to others for the marijuana activities at the Ranch, especially with respect to an individual such as Westmoreland, who could be cast as acting in a managerial role, and to present facts in support of an argument that Mr. Fowlie did not manage the individuals the government identified as his supervisees.~~

~~While there was evidence supporting shifting responsibility for the activities at the ranch to Westmoreland, and although it was consistent with Mr. Fowlie's interest, the attorney's self-interest in not appearing to present evidence he knew to be false or in making arguments that would cause him to lose personal and professional credibility before the judge, weighed against pursuing this strategy.~~

~~This same analysis is true with respect to eliciting evidence showing that Mr. Fowlie's two sons, Gus Fowlie and Dan Fowlie, Jr., had both engaged in marijuana activities completely independent of Mr. Fowlie, including the transporting, packaging, storing and selling of marijuana, at the direction of Ron Gates.~~

~~While this strategy would have been consistent with Mr. Fowlie's best interests, it was contrary to the attorney's interests. The attorney had previously told the presiding judge that Mr. Fowlie was responsible for his sons' crimes; and to present evidence and make an argument that contradicted what he had told the Court before would harm the attorney's personal and professional reputation with the presiding judge, and would expose the attorney to a claim that he was violating his ethical duty to the court system.~~

~~(c) There was documentary evidence available to the defense that the attorney could have affirmatively offered in support of Mr. Fowlie's defense that would have been helpful in significant respects. That documentary evidence included the following:~~

~~(i) copies of contractual agreements that reflected those legitimate loans;~~

~~(ii) documents evidencing a $1.2 million loan Mr. Fowlie received from San Marino Savings & Loan in California, which was converted to cash before being brought to him in the Netherlands;~~

~~(iii) documents and records establishing that Mr. Fowlie had made millions of dollars from his ownership and operation of legitimate businesses and real estate investments;~~

~~(iv) Mr. Fowlie's passport.~~

~~All of the above items of evidence could have benefitted Mr. Fowlie's defense, but Mr. Fowlie's attorney's decision whether to utilize this evidence was necessarily affected by his conflict, because the use of such evidence would have required the attorney to present affirmative evidence to support a factual proposition – that Mr. Fowlie was not guilty – which he had told the presiding judge was not true. Because of the negative consequences resulting from this kind of conduct, the attorney is likely to have chosen a strategy of highlighting the absence of evidence supporting contentions made by the government argument, rather than introducing affirmative evidence to support Mr. Fowlie's innocence, not because it was the best strategy for Mr. Fowlie, but due to the attorney's own interests.~~

~~(d) Another aspect of the representation that was likely to have been affected by the attorney's conflict is the handling of Robert Pellegrom's expected testimony. When confronted with this situation, the attorney did not argue to the Court that this evidence was critical to Mr. Fowlie's right to a fair trial, or explain that a brief continuance was essential so that a deposition of Pellegrom could be attempted. Rather, the attorney remarked to the Court that it would probably take "three to four weeks" to depose Pellegrom, that he wasn't even sure that Pellegrom would agree to be deposed, that he did not think the Court would grant such a request, and that he was not making such a request. It is likely that the attorney, given that he had already told the presiding judge that his client was guilty, realized that he could not pursue this request forcefully or credibly.~~

~~42. There was no waiver or purported waiver of the attorney's conflict by Dan Fowlie, Sr.~~

D. The Westmoreland Conflict

43. Attorney Riddet's representation of Dan Fowlie, Sr., occurred after he represented Westmoreland in a ~~substantially~~ related matter.

44. As his former attorney, Mr. Riddet continued to owe Mr. Westmoreland a duty of confidentiality and a residual duty of loyalty. Riddet's continuing duties to Westmoreland were implicated by Riddet's representation of Dan Fowlie, Sr. in a related matter in the following respects:

a. Riddet's duty of confidentiality to Westmoreland required that he refrain from improperly using any

confidential information he received from Westmoreland as a result of the attorney-client relationship, unless he first obtained Westmoreland's fully informed and independently counseled waiver;

b. Riddet's residual duty of loyalty to Westmoreland precluded him from taking a position or pursuing a line of defense in his representation of Dan Fowlie, Sr., that would harm or disadvantage or disparage Westmoreland, unless he first obtained Westmoreland's fully informed and independently counseled waiver;

c. Riddet's representation of Dan Fowlie, Sr. required him to be a zealous advocate of his client's position. It required Riddet to consider and evaluate possible defense strategies focusing exclusively on Dan Fowlie, Sr.'s best interest, without having to weigh the options available to an Fowlie, Sr.'s against the attorney's duties to other present or former clients, or to the attorney's own self-interest.

45. Attorney Riddet's successive representation of Dan Fowlie, Sr. in a substantially related matter, presented a potential conflict of interest arising out of Riddet's duties to both Westmoreland and Fowlie.

46. The potential for conflict existed because, for example, as part of Daniel Fowlie, Sr.'s defense, a reasonably competent attorney may well have attempted to shift to Westmoreland at least some of the responsibility for the unlawful activities at Rancho Del Rio, or of the tangible items seized from the search of Rancho Del Rio provided there was some evidentiary support for such a strategy. Having previously represented Westmoreland in a related matter,

however, Riddet still owed him a residual duty of loyalty that precluded Riddet from objectively evaluating or pursuing a strategy that would cast blame on Westmoreland.

~~47. This potential conflict became an actual conflict when Dan Fowlie, Sr. went to trial, asserting his innocence. In representing Dan Fowlie, Sr. at his trial, Riddet was obligated to challenge and defend zealously against the charges Fowlie faced. To fulfill this duty, the attorney was required to develop and pursue a line of defense that would be in Dan Fowlie, Sr.'s best interest, without regard to the interests of other present or former clients or the attorney's self-interest.~~

~~48. The defendant has made a showing that this actual conflict adversely affected his attorney's performance, in that he has identified particular aspects of his attorney's performance that the conflict likely affected. Defendant has also demonstrated that the conflict adversely affected his lawyer's performance in that he has identified alternative courses of action the attorney had available to him and chose between, as to which the interests of the clients favored the attorney choosing different alternatives. The particular aspects that the conflict likely affected, and the alternative courses of action available to the attorney as to which the clients' interests differed, included the following:~~

~~a. Disputing Mr. Fowlie's ownership of the incriminating items seized at Rancho Del Rio by shifting responsibility to Westmoreland;~~

~~b. Shifting responsibility to Westmoreland, who had been identified as the ranch manager, for the marijuana~~

~~activities at the Ranch.~~

~~49. There was no waiver of purported waiver of the Westmoreland conflict.~~

D. The Gus Fowlie Conflict

50. After Attorney Riddet's representation of Gus Fowlie had ceased, he continued to owe Gus Fowlie a continuing duty of confidentiality and a residual duty of loyalty. The attorney's continuing duties to Gus Fowlie gave rise to a potential conflict of interest in the attorney's representation of Dan Fowlie, Sr. in a related matter.

51. A potential for conflict existed because, on the one hand, the attorney was required to preserve and protect any confidential information he had obtained in his representation of Gus Fowlie, and to refrain from taking a legal position or making factual claims that would harm, disadvantage, or disparage Gus Fowlie. On the other hand, the attorney was required to represent Dan Fowlie, Sr. with zeal and to evaluate objectively, consider and pursue any line of defense or strategy that would benefit Dan Fowlie, Sr. and increase the likelihood of his acquittal.

~~52. Once Dan Fowlie Sr. decided to deny guilt and proceed to trial to seek acquittal, the potential conflict became an actual conflict, because the attorney's conflicting duties precluded him from providing independent, conflict-free and zealous representation to Dan Fowlie, Sr., without violating his duties to Gus Fowlie. For example, the attorney could not objectively evaluate, consider or pursue a strategy that would suggest Gus Fowlie might have acted independently of his~~

~~father on any occasion.~~

~~53. The defendant has made a showing that this actual conflict adversely affected his attorney's performance, in that he has identified particular aspects of his attorney's performance that the conflict likely affected. Defendant has also demonstrated that the conflict adversely affected his lawyer's performance in that he has identified alternative courses of action the attorney had available to him and chose between, as to which the interests of the clients favored the attorney choosing different alternatives. The particular aspects that the conflict likely affected, and the alternative courses of action available to the attorney as to which the clients' interests differed, included the following:~~

~~a. Pursuing the strategy of suggesting that Gus Fowlie had engaged in drug trafficking activities independently of Dan Fowlie, Sr. and/or at the direction of others.~~

~~Such a strategy might have assisted Daniel Fowlie, Sr. in rebutting the government's charges, especially the Continuing Criminal Enterprise charge (21 U.S.C. § 848). However, Riddet had a conflicting obligation to Gus that precluded him from pursuing this defense. Such a defense would have been harmful and contrary to Gus's interests because it would have disparaged Gus, Riddet's former client; would have contradicted Gus's plea agreement and Riddet's statements to the Court in connection with the plea; and could have required Riddet to use or discuss confidential information provided to him by Gus. Due to his residual duty of loyalty to Gus Fowlie, Attorney Riddet was precluded from objectively evaluating this strategy.~~

~~b. Objectively evaluating whether Gus Fowlie should be used as a defense witness.~~

~~Although Gus Fowlie had implicated his father as part of his plea agreement, he still might have had testimony helpful to Dan Fowlie, Sr.'s defense, such as testimony explaining the pressure put on him to implicate his father to the point of coercing him into overstating his father's culpability. Attorney Riddet could not objectively consider this possible defense strategy due to his continuing duty to Gus Fowlie.~~

~~54. The purported waiver of the Gus Fowlie conflict was not valid, because it did not fully explain the conflict, the court never made an inquiry to determine the validity of the waiver and the record indicates that Dan Fowlie Sr. was not advised by independent counsel regarding the conflict.~~

~~55. Dan Fowlie, Sr. was denied his Sixth Amendment right to conflict free representation as a result of each of the conflicts identified above.~~

Dated: October 15, 1997

Alicemarie H. Stotler
U.S. District Judge

Presented by:

William J. Genego
William J. Genego

Counsel for Defendant-Movant
Daniel James Fowlie, Sr.

Dated:

NORA M. MANELLA
United States Attorney
THOMAS H. BIENERT, JR.
Assistant United States Attorney
Chief, Santa Ana Branch Office
ELANA SHAVIT ARTSON
Assistant United States Attorney
600 West Santa Ana Boulevard
Suite 1100
Santa Ana, California 92701
Telephone: (714) 246-8121

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	) SA CV 95-802 AHS
	) SA CR-88-083-AHS
Plaintiff,	)
	)
v.	)
	)
DANIEL JAMES FOWLIE,	)
	)
Defendant-Movant.	)
	)

~~GOVERNMENT'S PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255

C-37

AS MODIFIED BY COURT

VOL. II

Filed October 15, 1997

Plaintiff United States of America hereby files its proposed findings of fact and conclusions of law in connection with defendant Daniel James Fowlie's motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255.

DATED: This 30th day of July, 1997

Respectfully submitted,

NORA M.. MANELLA
United States Attorney

THOMAS H. BIENERT, JR.
Assistant United States Attorney
Chief, Santa Ana Branch Office

Elana Shavit Artson
ELANA SHAVIT ARTSON
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND FACTS

1. On November 30, 1988, the grand jury returned an indictment charging defendant Daniel James Fowlie with operating a continuing criminal enterprise ("CCE"), conspiracy to possess with intent to distribute and to distribute marijuana, 17 counts of possession with intent to distribute and distribution of marijuana, conspiracy to defraud the United States and to fail to report currency transportation, and five counts of failure to report currency transportation. Defendant was extradited from Mexico in July 1990. After extensive pre-trial proceedings, trial commenced in March 1991. On April 19, 1991, the jury returned guilty verdicts on the CCE and conspiracy charges, as well as most of the substantive counts. Defendant was sentenced on June 10, 1991 to 30 years imprisonment and a fine of $1 million. The Ninth Circuit vacated defendant's conviction for conspiracy to possess marijuana and affirmed the remaining convictions in two published opinions dated May 2, 1994 and June 13, 1994. United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994) and United States v. Fowlie, 24 F. 3d 1070 (9th Cir. 1994). The Supreme Court denied certiorari on January 9, 1995. 115 S.CT. 742.

2. Prior to trial, defendant sought to substitute Michael Pancer and James Riddet as his counsel of record. The government moved to disqualify Pancer on the ground that he had previously represented a government witness, who refused to waive the attorney-client privilege existing between himself and Pancer. The government also moved to disqualify Riddet, who had previously represented defendant's son Gus Fowlie ("Gus"), a co-conspirator.

Defendant opposed the motions. This court ultimately disqualified Pancer, but permitted Riddet to substitute in. Illustrating the danger of the "district court being whipsawed -- damned if it does and damned if it doesn't disqualify," United States v. Stites, 56 F. 3d 1020, 1024 (9th Cir. 1995), cert. denied, 116 S.Ct. 967 (1996), defendant now contends that the court should have overruled his objections and disqualified Riddet.

LEGAL STANDARD GOVERNING CONFLICT CLAIMS

3. "In order to prove a violation of his Sixth Amendment right to conflict-free counsel, 'a defendant who raised no objection to the conflict at trial must demonstrate that an actual conflict adversely affected his lawyer's performance.'" United States v. Mett, 65 F.3d 1531, 1534 (9th Cir. 1995), cert. denied, 117 S. Ct. 185 (1996) (quoting Cuyler v. Sullivan, 466 U.S. 335, 348, 100 S.Ct. 1708, 1718 (1980)). "[T]he possibility of conflict is insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 348; accord, Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994) (actual conflict, as opposed to mere possibility of conflict, it is necessary and must be proven through a factual showing on the record).

4. An "actual conflict of interest" occurs when counsel "actively represented conflicting interests." Maiden v. Bunnell, 35 F3d 477, 480 (9th Cir. 1994). Generally, it is more difficult to prove an actual conflict resulting from successive rather than simultaneous representation. Id.

5. Although Cuyler's adverse effect prong does not rise to the level of actual prejudice, as ordinarily required with Washington, 446 U.S. 688 (1984), "it remains a substantial hurdle." Mett, 65 F.3d at 1534-35 (quoting Maiden v. Bunnell, 35 F. 3d at 481). "[A]n adverse effect in the Cuyler

sense must be one that significantly worsens counsel's representation of the client before the court or in negotiations with the government." Mett, 65 F.3d at 1535.

6. ~~While the Ninth Circuit has not adopted a formal test for determining whether an actual conflict adversely affected counsel's performance,~~ *An* majority of the circuit courts of appeal require a two-part showing: the defendant must demonstrate that some plausible alternative defense strategy or tactic of sufficient substance to be a viable alternative might have been pursued, and that this alternative was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985); Winkler v. Keane, 7 F.3d 304, 309 (2nd Cir. 1993), cert. denied, 511 U.S. 1022 (1994); United States v. Gambino, 864 F.2d 1064, 1070 (3rd Cir. 1988), cert. denied, 492 U.S. 906 (1989); Perillo v. Johnson, 79 F.3d 441, 449 (5th Cir. 1996); Kirby v. Dutton, 831 F.2d 1280, 1282 (6th Cir. 1987); United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990); Oliver v. Wainwright, 782 F.2d 1521, 1524-25 (11th Cir.), cert. denied, 479 U.S. 914 (1986); accord United States v. Harris, 846 F.Supp. 121, 129 (D.D.C. 1994). See also Burger v. Kemp, 483 U.S. 776, 784-85 (1987) (rejecting conflict claim where "determining that there was an actual conflict of interest require[d] the attribution of [counsel's] motivation for not making the lesser culpability argument to the [alleged conflict]," when record demonstrated that such argument was not viable).

RIDDET'S PRIOR REPRESENTATION OF GUS FOWLIE

A. Cuyler Standard

7. Defendant contends that his interests were in actual conflict with the interests of his son, Gus, because defendant asserted his innocence while Gus' plea agreement

in the related case states that Gus's participation in the conspiracy to distribute marijuana consisted of "assisting in the transportation, storage, packing and distribution of marijuana at the direction of Daniel James Fowlie and others." (Defendant's motion at 257, Exhibit P). However, the record demonstrates that there was at best a "possibility of conflict," but not an actual conflict, and that Riddet's performance was not adversely affected.

8. Gus knowingly and voluntarily waived any conflict arising from the successive representation. Gus met with independent counsel, who thoroughly explained the issues and was satisfied that Gus understood and desired to waive his rights to conflict-free counsel. (Defendant's motion at 368-69, Exhibit U). Gus filed a declaration asserting that he had consulted with independent counsel, that he understood the potential consequences of his waiver, and that he voluntarily waived any rights he had to object to Riddet's representation of defendant Fowlie and to continued confidentiality of his (Gus's) communications to Riddet. (Defendant's Motion at 366-67). Gus's valid waiver eliminated any actual conflict allegedly arising from divided loyalties. See United States v. Partin, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980) (where government witness waived attorney-client privilege existing between witness and defense counsel, conflict eliminated).

9. Furthermore, at the time of defendant's trial, Gus had already pleaded guilty and served most of his jail sentence. The record is devoid of evidence that Riddet took any action on behalf of Gus or to advance Gus' interests in connection with defendant's trial.

10. Likewise, there is nothing which Riddet omitted to do at the trial on behalf of defendant because such action would have prejudiced Gus. Defendant contends that an unconflicted attorney could have defended against the CCE charge by eliciting evidence that defendant's two sons engaged in marijuana activities at the direction of Ron Gates, this removing the sons from the ranks of the five required supervisees and bolstering the argument that Gates, not Fowlie, was the leader of the marijuana organization. Contrary to defendant's claim, Gus's plea agreement with the government did not preclude Riddet from developing any available evidence that Gus acted at the direction of Cooper, Gates, or other accomplices. Gus's plea agreement stated:

> It is [the government's] understanding that your client's participation in this conspiracy to distribute marijuana consisted of your client's assisting in the transportation, storage, packing and distribution of marijuana at the direction of Daniel James Fowlie and others. (emphasis supplied).

(Defendant's motion at 257-58, Exhibit P). Riddet did in fact argue forcefully that Cooper and Gates ran the marijuana organization; indeed, this was a principal focus of Riddet's closing argument. (See e.g., RT 3366, 3368, 3378-79, 3384-87, 3393, 3402, 3405-6, 3409). Furthermore, during cross-examination of the government's witnesses, Riddet consistently adduced testimony suggesting that the accomplices' activities were independent of Fowlie. (See ¶ 27 infra). The further notion that counsel could have elicited evidence that Gus acted independently, or at the direction of Cooper or Gates, is pure speculation; defendant points to nothing in the record of the trial or the instant motion suggesting that such evidence existed. In any event, the

implausible claim that defendant's sons acted at the direction of Cooper/and or Gates rather than defendant would not have exonerated defendant, since the evidence included far in excess of five supervisees exclusive of defendant's sons.

11. Defendant also speculates that Gus might have had testimony helpful to defendant, and urges that the alleged conflict prevented Riddet from objectively evaluating whether Gus should be used as a defense witness. However, defendant's "wishful suggestions cannot substitute for declaratory or other evidence." Morris v. State of California, 966 F.2d 448, 455 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992) ("An actual conflict must be proved through a factual showing on the record . . . [the court cannot] create a conflict of interest out of what might have been shown.") Accord, United States v. Mims, 928 F.2d 310, 313 (9th Cir. 1991) (rejecting conflict claim where nothing in the record corroborated defendant's conjecture that counsel used a codefendant's statement that he would testify on defendant's behalf in order to exact further concessions from the prosecution for the codefendant, rather than working to reduce defendant's sentencing exposure).

B. Waiver

12. Even if counsel is subject to an actual conflict of interest, a defendant may waive his right to the assistance of an attorney unhindered by conflicts, if the waiver is given knowingly and intelligently. Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978); Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994), cert. denied, 514 U.S. 1024 (1995). When assessing the soundness of a waiver, the court is "more concerned with whether the defendant appreciated his predicament and made a properly informed choice than . . . with whether the trial judge recited any particular litany of questions." Garcia v. Bunnell, 33 F.3d at 1197 (quoting

United States v. Jenkins, 943 F.2d 167, 176 (2nd Cir.), cert. denied, 112 S.Ct. 659 (1991).

13. Assuming arguendo that a conflict existed, the court finds – based upon its review of the record, supplemented by the court's notes and recollection of the pre-trial and trial proceedings and its observations of defendant's demeanor and of his various counsel during such proceedings, as well as its familiarity with the legal talents and character of the lawyers in question – that Fowlie knowingly, intelligently, and voluntarily waived any conflict at the time Riddet was permitted to substitute in as counsel of record. See Shah v. United States, 878 F.2d 1156, 1159 (9th Cir.), cert. denied, 493 U.S. 869 (1989) (in §2255 proceeding court may supplement record with own notes and recollections as well as common sense); Burger v. Kemp, 483 U.S. at 785 (deferring to district judge's familiarity with legal talents and character of lawyers who practice in the local bar, and to district court's direct observation of proceedings in reviewing alleged conflict of interest).

14. At a motions hearing on November 19, 1990, Riddet advised the court that defendant had requested Pancer and Riddet to represent him, and that they had agreed to do so. (RT 11/19/90 at 130). The court declined to accept the substitution on that date. (RT 11/19/90 at 141). Among other reasons, the court stated as follows:

> It seems to me I should rightly be concerned also about the possibility of a conflict h ere. It's maybe nonexistent, maybe there's nothing to worry about. I can only say that I'm left with the impression that the Fowlie juniors had strongly suggested, if not through counsel, through some of the filings with the court, that it was Dan Fowlie who is

> responsible for everyone's misconduct in this case. I'm not sure that there is a problem for Mr. Riddet, but there might be. I would like to know that there isn't a concern in that regard. So what I'm willing to do is postpone the hearing on the [extradition] motion for one week and hear at the same time a legitimate application as to whether there should be substitution of counsel.
>
> * * *
>
> I think a written application that would include the question of conflict would make me feel a great deal more confident about how we should decide this issue.

(RT 11/19/90 at 142-43, 144).

15. On November 21, 1990, appointed counsel for defendant filed a motion to substitute counsel, attaching a declaration from defendant. That declaration stated in pertinent part:

> [Y]our declarant believes that Mr. Riddet is one of the premier criminal defense layers [sic] in Orange County and has the greatest respect for his trial skills. In addition, your declarant knows Mr. Riddet has been successful in a related case in suppressing evidence that if suppressed in the instant case would be of great assistance to your declarant.

(Defendant's Motion at 297-298, Exhibit S).

16. Also on November 21, 1990, the government filed a memorandum of law regarding the substitution of counsel outlining the factual background of the conflict, and pointing out that "Gus Fowlie's plea agreement described his participation in the conspiracy as 'assisting in the

transportation, storage, packing and distribution of marijuana at the direction of Daniel James Fowlie and other.'" (Defendant's motion at 269, Exhibit R).

17. On November 26, 1990, this court held a hearing on the substitution motion. The court declared a recess during the hearing, at which time defendant reviewed the government's November 21 filing with his appointed counsel, James Brustman and David Haigh, as well as attorney Riddet. (Defendant's Motion at 308-09, Exhibit T). Following the recess, Brustman informed the court:

> "We've also discussed with Mr. Fowlie various possible scenarios whereby the conflict of interest, if any, would manifest themselves and it is my understanding that Mr. Fowlie understands the theoretical basis of the alleged conflict of interest and is willing to waive and give up any – any problems that may exist because of those conflicts and would ask the court to substitute in Mr. Pancer and Mr. Riddet.

(Defendant's motion at 310, Exhibit T). The court declined to accept the substitution, stating:

> With regard to Mr. Riddet, I am not satisfied that there is not a problem here, and it surely hasn't been cured as of today. I take it from defense counsel that defendant Fowlie who is before the court would make a statement to the effect that he would waive any conflict, and we haven't done that at this point, but the other party who was first represented by Mr. Riddet hasn't been heard from.

(Defendant's motion at 342, Exhibit T).

18. On December 4, 1990, defendant moved to substitute Mr. Riddet and Michael Abzug as counsel of record. In connection with the motion, Mr. Abzug filed a declaration stating that he had thoroughly explained to defendant his right to independent counsel, and that Mr. Abzug was thoroughly convinced, based upon the conversation, that defendant waived this right knowingly and voluntarily. (Defendant's Motion at 373, Exhibit U). Defendant also submitted a declaration, asserting in pertinent part as follows:

> 14. I am aware that Mr. Riddet represented my son in a case encaptioned United States v. Cooper, et al, SA CR 88-82-AHS. I am also aware that I was an unindicted co-conspirator in that case and that my son's plea agreement stated that he distributed marijuana at my direction and others.
>
> 15. Mr. Riddet has supplied me with both the Government's memorandum of law regarding substitution of counsel and the Government's response to the defendant's motion to change attorneys. I am aware, from having thoroughly reviewed those documents and from my discussions with Mr. Abzug, that I have the absolute right to refuse to accept Mr. Riddet as my attorney because of his earlier representation of my son . . .. I am aware that the Government considers my son as a potential witness against me and may ask him questions regarding whether he has performed illegal acts at my direction. To the extent that Mr. Riddet's professional

> responsibility to represent me conflict with any residual obligation he may have to my son should he be called to testify at my trial and should Gus be required to answer questions in a manner which incriminates me, I expressly waive and give up any right I have to object to that conflict.

(Defendant's Motion at 364-65, Exhibit U).

19. At the parties' next appearance before the court, December 10, 1990, this court permitted Mr. Riddet and Mr. Abzug to substitute in as counsel for defendant, and also continued the trial to a date requested by new counsel:, ***finding no conflict to exist.*** (Defendant's motion at 391, Exhibit V).

20. The facts here are similar to Garcia v. Bunnell, 33 F.3d 1193 (9th Cir. 1994), in which the court found a knowing, intelligent and voluntarily waiver of defendant's right to conflict-free counsel. In Garcia, defendant Garcia's appointed counsel disclosed on the morning of trial that he had accepted a position with the prosecuting district attorney's office to commence at the end of the trial. The trial judge granted Garcia's request for a five day continuance to consult with others as to whether he should continue with his appointed counsel, but warned Garcia that he would be reluctant to replace appointed counsel, citing concerns about the court's docket and convenience of witnesses. When the trial resumed, Garcia told the court that he had consulted with his family and others and desired to proceed with his appointed counsel. Id. at 1194-97.

21. Here, as in Garcia, the record "shows a defendant who was well aware of his interests, his right to an unbiased counsel, his right to seek outside legal advice." Id. at 1197. When this court initially declined to accept the

substitution of Riddet, the court specifically explained that a possible conflict existed because defendant's sons had taken the position that defendant Fowlie was responsible for their misconduct. At the next hearing, defendant reviewed the government's memorandum of law regarding the substitution, which also pointed out that a potential conflict existed because Gus' plea agreement described Gus as having acted at the direction of defendant Fowlie. Between the first hearing at which the proposed substitution was discussed (November 19, 1990) and the date on which the court finally permitted the substitution (December 10, 1990), defendant had ample opportunity to seek, and did in fact seek, outside legal advice. Defendant consulted with his appointed counsel, Brustman, as well as with independent counsel, Abzug, both of whom represented to the court that defendant understood his right to unconflicted counsel and waived that right. In addition, defendant submitted a declaration in conjunction with his December 4, 1990 motion to substitute attorneys Riddet and Abzug, after the court had twice refused (on November 19 and again on November 26) to accept the substitution due to concerns over the Gus Fowlie conflict. It is apparent that this declaration was made in direct response to the court's statements at the November 26 hearing to the effect that a proper waiver of the Gus Fowlie conflict was a necessary prerequisite to Riddet's representation of defendant. Defendant's declaration clearly articulated the factual basis of the alleged Gus Fowlie conflict – it referred specifically to Gus's plea agreement – and forthrightly affirmed defendant's desire to proceed with Riddet as counsel notwithstanding such conflict. Indeed, in his declaration, defendant waived a far more substantial and damaging situation than the predicament alleged to have materialized here; defendant's declaration went so far as to recognize that he was relinquishing any right

to object if Gus were called as a government witness to testify in a manner incriminating to defendant. Finally, in conjunction with the substitution, the court continued the trial to a date requested by defendant and his new counsel.

22. Prior to trial, defendant declared that he wished Riddet to represent him because of Riddet's outstanding reputation and trial skills, and specifically because Riddet had succeeded in suppressing the critical Rancho Del evidence in a state criminal prosecution against another individual, Wade Westmoreland. After the court twice explained its reasons for rejecting the substitution, defendant consulted with independent counsel and subsequently expressed a clear understanding of the conflict and an unequivocal desire to waive it. Only now, four and a half years after his conviction, does defendant indicate any dissatisfaction with Riddet. In sum, defendant clearly understood the situation and made an informed choice. Garcia, 33 F.3d at 1197; see also United States v. Akinseye, 802 F.2d 740, 745 (4th Cir. 1986), cert. denied sub nom Ayodeji v. United States, 482 U.S. 916 (1987) (waiver valid where judicial officers twice informed defendant about dangers of joint representation, and defendant executed waiver stating that he considered court's representation and nonetheless chose to proceed with joint representation even though attorney also representing co-defendant, whose interests may conflict with defendant's).

C. The Attorney's Alleged Conflict

23. Defendant further urges that Riddet's earlier representation of Gus create an actual conflict between Riddet's personal interests and the interests of defendant because, having told the court that Gus had acted at defendant's direction, Riddet could not subsequently advocate defendant Fowlie's innocence without jeopardizing his own (Riddet's) credibility with the court.

24. Allegations of conflicts between a defendant's and his attorney's own personal interests are analyzed under the two-pronged test set forth in Cuyler. Garcia v. Bunnell, 33 F.3d at 1198 n.4. Not every perceived ethical problem creates a conflict of interest for constitutional purposes. Maiden v. Bunnell, 35 F.3d at 481 n.4; McConico v. State of Alabama, 919 F.2d 1543, 1548 n.6 (11th Cir. 1990).

25. The record contradicts defendant's claim that Riddet actively represented conflicting interests as required by Cuyler. This was not a situation where, for example, Riddet was required to advocate his own incompetence. Compare, United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1995) ("When Del Muro's allegedly incompetent trial attorney was compelled [on motion for new trial] to produce new evidence and examine witnesses to prove his services to the defendant were ineffective, he was burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client. The conflict was not only actual, but likely to affect counsel's performance."). Rather, the claimed conflict here is inseparable from the conflict allegedly caused by Riddet's successive representation of Gus and defendant, and therefore fails for the same reasons set forth in subsections A and B supra.

26. Defendant's reliance upon United States v. Stites, 56 F.3d 1020 (9th Cir. 1995), is misplaced. The defendant in Stites challenged the district court's disqualification of his attorney, who had previously represented an underling (Stites' sister) in the same case. As part of her plea agreement, the sister agreed to testify against Stites. The district court found the sister's attempted waiver of the conflict invalid because it was coerced by defendant Stites. Consequently, an actual conflict existed. In the instant case, unlike Stites, Gus's waiver was valid and was accepted

by the court. Furthermore, Gus's plea agreement did not require him to cooperate and testify against his father. In addition, Stites involved a different legal standard from the one governing defendant's attack here. Stites was decided pursuant to the more relaxed legal standard governing pretrial disqualification of counsel, which permits substantial latitude to the district court to disqualify counsel based upon "a showing of a serious potential for conflict." Stites, 56 F.3d at 1024 (emphasis supplied). Thus, Stites does not establish that Riddet actively represented conflicting interests as required by the higher Cuyler standard.

27. Defendant has also failed to demonstrate an adverse effect on Riddet's performance. Defendant theorizes that as a result of the purported conflict, Riddet chose a strategy of highlighting the absence of evidence supporting the government's contentions rather than presenting affirmative evidence to support Fowlie's innocence. It is claimed that Riddet opted for the former strategy because the latter would have compromised his personal interests and credibility with the court by requiring him to contradict statements concerning Fowlie's involvement which he had made to the court at Gus's sentencing. (e.g. Defendant's Motion at 120, Exhibit A). However, the record refutes defendant's hypothesis. Defense counsel repeatedly elicited precisely the type of "affirmative" evidence defendant claims was lacking. Riddet did not merely argue that the government's evidence was insufficient; he actively endeavored to portray Cooper, Gates and the government's other accomplice witnesses as the forces behind the charged marijuana activities, while casting Fowlie as a legitimate businessman. (E.g. RT 361, 365, 393, 396, 400-06, 412-13, 422-424, 428, 429, 443-44, 446-47, 459-61 (Cooper); 1296, 1310-16, 1321-22, 1329-53 (Brook); 1718-19 (Garris); 1911-

37, 2057-60, 2063-85, 2099-2103 (Glover); 2315-16 (Foster); 2790-94 (Brouwerens).

28. Defendant also contends that Riddet declined to pursue various theories or offer various documents because his statements about Fowlie in connection with Gus's sentencing precluded him from accepting and promoting Fowlie's innocence to the court. However, "determining that there was an actual conflict of interest [adversely affecting Riddet's performance] requires the attribution of [Riddet's] motivation for not making the [arguments identified by defendant] to the fact that [Riddet had previously represented Gus]." Burger v. Kemp, 483 U.S. at 784-85. A brief examination of each alleged omission reveals that the attribution cannot be made here because Riddet did in fact adopt an "affirmative" trial strategy of shifting blame for the illegal drug activities to the government's witnesses.

a.) Defendant suggests that the evidence found at Rancho del Rio could have been attributed to Westmoreland rather than to Tim Neeb, and that Westmoreland could have been cast in the managerial role instead of Cooper and Gates. However, these choices all rest on the premise that blame should be shifted away from Fowlie onto others. Accordingly, the decision of how and where to shift blame could not have been motivated by a desire to avoid portraying Fowlie as innocent. Additionally, the record demonstrates that shifting responsibility to Westmoreland for the incriminating items found at the ranch was not a plausible alternative. See ¶ 33 infra.

c.) Defendant urges that Riddet did not introduce available documents and records establishing that defendant had made millions of dollars from his ownership and operation of legitimate businesses and real estate investments, as well as documents reflecting that Fowlie had loaned

Cooper money for a back operation, allegedly explaining why Cooper had sent cash to Fowlie in Holland. With respect to defendant's legal earnings, no such documents have been presented. Morris, 966 F.2d at 455-56; Mims, 928 F.2d at 313. In any event, since Riddet elicited the same facts through cross-examination, it cannot be inferred that Riddet was attempting to avoid harming his personal and professional reputation with the presiding judge. (RT 380-81, 391-393, 1937-38, 2041-52, 2278-91, 2675-85, 2688-91, 3196 (income); 456-57, 2053-54 (loan for back operation)).

d.) Defendant maintains that Riddet should have introduced into evidence Fowlie's passport, showing that Fowlie was abroad at the time of the ranch search. However, the passport was at best redundant. It was not disputed that Fowlie was on a trip at the time of the ranch search, and both sides adduced evidence of Fowlie's absence from the ranch on the day of the search. (RT 2675, 2854, 2878). The disagreement at trial centered upon the inferences to be drawn from Fowlie's absence, and the passport had no bearing upon this issue. Again, it cannot be inferred that Riddet's advocacy was curtailed by counsel's desire to avoid contradicting the statements he had made about Fowlie during Gus's sentencing.

29. Finally, defendant challenges Riddet's handling of Robert Pellegrom's expected testimony. During a videotaped interview conducted in Holland, Pellegrom told a defense investigator that government agents induced him to give false testimony against Fowlie in exchange for favorable treatment. United States v. Fowlie, 24 F.3d 1059, 1068 (9th Cir. 1994). Defendant faults Riddet for failing to argue that Pellegrom's testimony was critical, and contends that an unconflicted attorney would have argued more forcefully that a continuance to depose Pellegrom was essential. Again, the

record refutes defendant's conjecture. Riddet vigorously sought to introduce the videotaped interview of Pellegrom, (RT 2953-2964), and he argued to the court that "one of the most important pieces of evidence in this case [is] testimony or prior statements from Robert Pellegrom in which he indicated that he was coerced and threatened by government agents to make false statement[s]." (RT 2954). The court agreed to review the entire videotape "given the strength that the defense attache[d] to it." (RT 2986). Furthermore, it cannot be reasonably inferred that the alleged conflict influenced Riddet's decision whether to insist upon a continuance to depose Pellegrom. The videotape was far more beneficial to Fowlie than Pellegrom's deposition testimony, as the content of such deposition testimony is entirely speculative. Furthermore, a deposition would have permitted the substantive introduction of Pellegrom's admittedly incriminating and corroborated grand jury testimony. Fed.R.Evid. 801(d)(1); RT 3176. Finally, Pellegrom's expected testimony was "entirely tangential to the issues affecting Fowlie's guilt or innocence." Fowlie, 24 F.3d at 1070. Accordingly, any supposed conflict could not have "significantly worsen[ed] counsel's representation of the client before the court." United States v. Mett, 65 F.3d 1531, 1535 (9th Cir. 1995), cert. denied, 117 S.Ct. 185 (1996).

RIDDET'S PRIOR REPRESENTATION OF WADE WESTMORELAND

30. Defendant alleges an additional conflict due to Riddet's prior representation of Wade Westmoreland in a separate state prosecution. In February 1985, after a 50 pound bale of marijuana was discovered at Westmoreland's home in Laguna Beach, Westmoreland was arrested by local authorities for possessing marijuana for sale. A search of his

residence uncovered keys, letters and photographs linking him to Rancho del Rio and suggesting that he was the ranch foreman. Based upon this information, on March 1, 1985, an Orange County Sheriff's Deputy obtained and executed a search warrant for Rancho del Rio. (Ex. K to defendant's motion). On March 5, 1985, Westmoreland and Fowlie were charged by state authorities with conspiracy to sell narcotics; Westmoreland was also charged with possession for sale of the 50 pound bale of marijuana found at his residence. (Ex. I to defendant's motion). A state trial judge found the affidavit supporting the Rancho del Rio warrant defective and suppressed the evidence seized from the ranch. (Ex. L to defendant's motion). The next day, Westmoreland pled guilty to the possession count and the conspiracy count was dismissed. Fowlie was never arrested and the state charges against him were dismissed. (Ex. J and M to defendant's motion). Westmoreland appeared before the grand jury during the investigation of the instant case, but was not represented by counsel. He was not charged in connection with the federal investigation of Fowlie's marijuana empire.

31. Defendant contends that Riddet's prior representation of Westmoreland created an actual conflict, and that such conflict adversely affected Riddet's performance because an unconflicted attorney would have shifted blame for the evidence discovered during the search of Rancho del Rio, and for the illegal activities at the ranch, to Westmoreland.

32. "In successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties." Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir.), cert. denied, 488 U.S. 908 (1988). "An actual conflict must be proved through a factual

showing on the record . . . [the court cannot] create a conflict of interest out of what might have been shown." Morris v. State of California, 966 F.2d 448, 455 (9th Cir. 1991). The instant case bears striking resemblance to Morris. In that case, Ms. Morris argued that her trial counsel suffered from a conflict of interest because he was simultaneously defending her husband in an unrelated narcotics prosecution. In rejecting this claim, the court stated:

> Ms. Morris' bare allegation of a conflict of interest is insufficient to entitle her to an evidentiary hearing on the question. In order to establish an actual conflict of interest she would have had to introduce, at a minimum, an affidavit from her husband disclosing what he would have said at her trial had he testified. She has introduced no evidence demonstrating that her husband's testimony might have been helpful to her, and that her attorney therefore faced a conflict of interest in determining whether to call him as a witness. Although her brief on appeal is heavy with speculation as to the contents of his unsolicited testimony, her wishful suggestions cannot substitute for declaratory or other evidence. In the absence of any record evidence as to the existence of an actual conflict of interest, the district court was correct to reject her claim that such a conflict existed.

Id. 966 F.2d at 455-56. Here, as in Morris, defendant's brief is "heavy with speculation" but devoid of declaratory or record evidence that Westmoreland was responsible for the marijuana activities at Rancho del Rio. Defendant has

introduced no affidavit from any witness stating as such. Defendant offers only a dismissed state conspiracy charge against Westmoreland and Fowlie, and the affidavit in support of the search warrant for Rancho del Rio, which this court found lacking in probable cause. See United States v. Fowlie, 24 F.3d 1059, 1067 (9th Cir. 1994). Neither constitutes the type of "factual showing on the record" required by Morris.

33. Additionally, defendant's claim fails the two-prong test set forth in Fahey and its progeny, 769 F.2d at 836, ∧ ***and defendant cannot establish an impact on Riddet's performance was likely*** because shifting blame to Westmoreland for the evidence discovered at the ranch was not a viable defense strategy. Westmoreland was not at the ranch on the day of the search (RT 2864), and there is no evidence that he had recently been to the ranch, or that he had access to the main residence or other areas where incriminating evidence was found. Nor is there evidence that the marijuana bale was found in Westmoreland's residence came from Fowlie's ranch. During the lengthy trial, the names and activities of tens of accomplices were discussed. Witnesses testified extensively about their dealings with each other and with other accomplices who did not appear at trial. Yet not a single witness named Westmoreland as a participant.[1] Moreover, the limited items found at Westmoreland's home are not consistent with management responsibility for the very large scale drug distribution network described during the trial; rather, they are indicative

---

[1] The only mention of Westmoreland's name was a passing reference to the location of his house on the ranch (RT 2863).

of a smaller scale drug dealer.

34. The only plausible tactic to defend against the ranch evidence was the one adopted by Riddet: to shift blame to Tim Neeb (Robert Brook's partner) and their cohorts. During the search, law enforcement officers found a white truck at the ranch into which a false wall had been built. (RT 2846-49). Darold Baker, one of Neeb's subordinates, had driven the truck to the ranch in order to pick up a load of marijuana. (RT 2897, 2904-05, 2913). Baker visited the ranch with Neeb and Heaslip (another individual who worked for Neeb and Brook), and saw them go into the house where much of the incriminating evidence was found. (RT 1053, 2907-2908). Neeb and Heaslip had a remote controlled device which enabled them to open the entrance gate to the ranch. (RT 2908). Baker further testified that he had never met Fowlie. (RT 2919). Furthermore, there was extensive evidence at trial that Brook and Neeb were involved in the distribution of multi-ton quantities of marijuana, and had been in the drug business during the entire period covered by the indictment. (e.g. RT 1040-44, 1062, 1131, 1354-56). In addition, Gates testified that at the time of the ranch search he was selling marijuana to Neeb independent of Fowlie. (RT 716). Accordingly, shifting blame to Neeb and his associates not only rebutted the government's arguments concerning evidence seized from Rancho del Rio, but also buttressed Riddet's portrayal of Gates as the moving force behind the charged conspiracy, thus refuting the prosecution's earlier evidence as well.

35. Defendant has not shown that Riddet's prior representation of Westmoreland created an actual conflict or that Riddet's performance was detrimentally impacted thereby.

CONCLUSION

36. Because the record contradicts defendant's claims concerning the alleged conflicts, defendant is not entitled to an evidentiary hearing. United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986).

37. For the reasons set forth above, defendant Daniel James Fowlie's § 2255 motion is denied.

Dated: October 15, 1997

Alicemarie H. Stotler
ALICEMARIE H. STOTLER
United States District Judge

Presented by:

Elana Shavit Artson
ELANA SHAVIT ARTSON
Assistant United States Attorney

(3)

Supreme Court, U.S.
FILED

NOV 5 2001

No. 01-583

In the Supreme Court of the United States

DANIEL JAMES FOWLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 pp

QUESTIONS PRESENTED

1. Whether a defendant who alleges that his attorney labored under a conflict of interest in violation of the Sixth Amendment must show both an actual conflict of interest and an adverse effect on performance.

2. Whether petitioner established that his counsel's alleged conflict of interest adversely affected his performance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Case:

Mickens v. *Taylor*, No. 00-9285 (argued Nov. 5, 2001) 5, 7

Statutes:

18 U.S.C. 371 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 848 2
28 U.S.C. 2255 ..... 2, 4
31 U.S.C. 5316 2
31 U.S.C. 5322(a) 2
31 U.S.C. 5322(b) 2

In the Supreme Court of the United States

No. 01-583

DANIEL JAMES FOWLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B2-B5) is unreported, but the judgment is noted at 172 F.3d 877 (Table). The order of the district court (Pet. App. C6-C12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1999. The petition for rehearing was denied on June 26, 2001 (Pet. App. A1). The petition for a writ of certiorari was filed on September 24, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; eight counts of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiring to defraud the United States, in violation of 18 U.S.C. 371; and four counts of failing to report currency transportation, in violation of 31 U.S.C. 5316 and 5322(a) and (b). He was sentenced to 30 years' imprisonment and fined $1 million. Pet. App. C38. The court of appeals affirmed petitioner's conviction on each count except the drug conspiracy count, which it vacated. See 24 F.3d 1059 (9th Cir. 1994); 24 F.3d 1070 (9th Cir. 1994). This Court denied the petition for a writ of certiorari. 513 U.S. 1086 (1995). Thereafter, petitioner collaterally attacked his conviction under 28 U.S.C. 2255. The district court denied the motion, Pet. App. C6-C12, and the court of appeals affirmed, *id.* at B2-B5.

1. Between 1981 and 1986, petitioner led an organization that distributed more than 30 tons of marijuana throughout the United States and Canada. Gov't C.A. Br. 2. The marijuana was smuggled into the United States from Mexico. Petitioner then distributed the marijuana from his ranch in San Juan Capistrano, California, a series of warehouses in Orange County, California, and San Antonio, Texas. *Id.* at 3-4. In March 1985, while petitioner was in Mexico, local law enforcement officers conducted a search of petitioner's ranch. *Id.* at 4. The search uncovered marijuana residue, an Uzi semiautomatic firearm, and other drug-related

evidence. Petitioner was extradited from Mexico in order to stand trial.

2. Several months after petitioner was indicted, a grand jury returned a related 25-count indictment charging his son, Gus Fowlie, and others with conspiring to possess marijuana with intent to distribute it and related offenses. Gus Fowlie's indictment covered the same conduct with which petitioner was charged. The indictment named petitioner as an unindicted co-conspirator. Pet. App. C16.

Attorney James D. Riddet represented Gus Fowlie. Pet. App. C16. Riddet negotiated an agreement with the government pursuant to which Gus Fowlie pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute it. As a condition of the agreement, Gus Fowlie implicated petitioner in the conspiracy, stating that his role in the conspiracy was "assisting in the transportation, storage, packing and distribution of marijuana at the direction of [petitioner] and others." *Id.* at C17 (citation omitted).

At Gus Fowlie's sentencing, Riddet minimized Gus Fowlie's criminal culpability by assigning responsibility for his participation in the marijuana conspiracy to petitioner. Riddet told the court that "[i]t would be foolish to dispute the fact that [petitioner] was running an extremely large marijuana organization. And what concerns me [as] counsel for Gus Fowlie is that that might rub over onto Gus Fowlie who was indeed a minimal participant, nothing more than unfortunately the son of [petitioner]." Riddet made other statements asserting petitioner's guilt. Pet. App. C17-C18 (citations omitted).

After Gus Fowlie was sentenced, petitioner appeared before the same district judge who had presided over Gus Fowlie's case. Pet. App. 2. Petitioner was initially

represented by appointed counsel, but later he retained Michael Pancer and Pancer selected Riddet as local counsel. Riddet filed a motion seeking authorization for him and Pancer to substitute for appointed counsel. The court disqualified Pancer because he had previously represented a witness the government planned to call against petitioner. Thereafter, Riddet filed another motion to substitute himself as counsel. In support of the motion, Riddet attached conflict waivers signed by petitioner and Gus Fowlie. The court agreed to Riddet's substitution, finding that Riddet did not labor under any conflict of interest. Pet. App. C18-C20. Petitioner was convicted of operating a continuing criminal enterprise and numerous related offenses, and those convictions were affirmed.

3. Petitioner collaterally attacked his convictions under 28 U.S.C. 2255, arguing that Riddet had a conflict of interest based on Riddet's prior representation of Gus Fowlie and Riddet's acknowledgment at Fowlie's sentencing that petitioner was guilty of participating in the charged drug conspiracy. He argued that Riddit's acknowledgment prevented Riddet from arguing petitioner's innocence because doing so would have "forc[ed] [Riddet] to take inconsistent positions before the same judicial officer." Pet. App. C10.

The district court denied petitioner's conflict of interest claim. Pet. App. C10-C12. The court pointed out that Riddet had consistently argued in this case that petitioner was a legitimate businessman, that petitioner was innocent of the charges, and that others were responsible for the conspiracy. *Id.* at C10-C11. The court concluded that petitioner had "failed to establish that a[n] ethical dilemma existed, let alone that a conflict of interest for constitutional purposes arose." *Id.* at C11. The court went on to hold that, even if there

were a conflict, petitioner had failed to show that the conflict adversely affected Riddet's performance. *Ibid.*

4. The court of appeals affirmed. Pet. App. B2-B5. The court held that petitioner had voluntarily waived any conflict of interest based on Riddet's prior representation of his son. *Id.* at B3-4. The court concluded, however, that petitioner's waiver did not reach his claim that Riddet was self-conflicted as a result of his statements to the district court at Gus Fowlie's sentencing. The court reasoned that nothing in the record suggested that petitioner was aware that Riddet had "argued [petitioner's] own guilt during the course of that representation." *Id.* at B5 n.2. The court of appeals further held that Riddet's statements at the sentencing hearing created an actual conflict of interest. *Id.* at B4. The court nonetheless rejected petitioner's conflict-of-interest claim on the ground that petitioner failed to show that the conflict adversely affected Riddet's performance. *Id.* at B5. The court explained that Riddet had "argued [petitioner's] innocence, vigorously cross-examined the government's witnesses, and attempted to shift the blame to several viable suspects." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-19) that where the trial court fails to inquire into a conflict about which it knows or reasonably should know, a defendant should be afforded relief on collateral review merely by showing that his attorney had an actual conflict, regardless of whether the conflict adversely affected the attorney's performance. That issue is currently before the Court in *Mickens* v. *Taylor*, No. 00-9285 (argued Nov. 5, 2001). The Court should therefore hold the petition in this case pending the decision in *Mickens*.

2. Petitioner also contends (Pet. 22) that he demonstrated that Riddet's alleged conflict of interest adversely affected his performance because it caused Riddet to limit his defense to challenging the government's evidence and to refrain from offering evidence which assumed petitioner's innocence. In particular, he claims (Pet. 22-29) that Riddet's alleged conflict prevented him from offering evidence that the items found at petitioner's ranch belonged to the ranch manager, Wade Westmoreland, that Westmoreland was the manager of the drug enterprise, that petitioner left his ranch a week before the search, and that petitioner had an innocent explanation for a large sum of money sent to him by Joseph Cooper, his bookkeeper and "right hand man."

As the courts below found, however, Riddet did not merely argue that the government's evidence was insufficient to establish guilt beyond a reasonable doubt. He portrayed petitioner as a "legitimate businessman" (Pet. App. C11), "argued [petitioner's] innocence, vigorously cross-examined the government's witnesses, and attempted to shift the blame to several viable suspects." *Id.* at B5. In those circumstances, there is no basis for overturning the findings of both courts below that petitioner failed to demonstrate that Riddet's alleged conflict adversely affected his performance. In any event, that fact-bound issue does not warrant this Court's review.

CONCLUSION

With respect to question one, the petition for a writ of certiorari should be held pending the decision in *Mickens* v. *Taylor*, No. 00-9285 (argued Nov. 5, 2001), and then disposed of as appropriate in light of that decision. With respect to question two, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

DECEMBER 2001